VINER (Charles) c4 6144.e.1
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AN

ABRIDGMENT

OF THE

MODERN DETERMINATIONS

IN THE

Courts of Law and Equity:

BEING A

SUPPLEMENT

TO

VINER's ABRIDGMENT.

BY SEVERAL GENTLEMEN

IN THE RESPECTIVE BRANCHES OF THE LAW.

VOLUME THE SIXTH.

Quare Impedit—Waber.

INDEX OF GENERAL TITLES.

INDEX OF NAMES OF CASES.

LONDON:

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FOR T. PAYNE; E. BROOKE, AND J. CLARKE; J. BUTTERWORTH;

J. WALKER; E. BANISTER; AND W. REID.

1806.

PREFACE.

PREFACE.

THE firſt and moſt material object in a Legal Abridgment is a due diſpoſition of the Caſes under apt and proper Titles. The Arrangement adopted by Mr. VINER differs materially from thoſe followed in the New Abridgment, and in the maſterly Digeſt by Lord Chief Baron Comyn. Its chief defect originates from the Author's having erected the heavy ſtructure of a moſt comprehenſive Work, upon the narrow foundation of Rolle's Abridgment. Law is the Creature of that Society which it regulates and reſtrains. Its elemental principles are unchangeable, but their application and extent in judicial deciſion, muſt vary with the ſwell and current of human Affairs, as the limits of the earth are varied by the attritions, or receſs of the Tide.

The rules reſpecting rights which ariſe out of commercial relations, have much increaſed between the time when the learned Chief Juſtice flouriſhed, and that in which Mr. VINER wrote; during the ſame period, our Laws of real property have undergone an alteration ſtill more perceptible from the ſalutary violence of ſtatutory

innovation. The learned Judge in his admirable Abridgment had ſelected Titles, and formed diviſions ſufficient to comprehend his limited materials, and diſpoſe them in perſpicuous order. But our Author was diſabled by an abundance of matter from crowding within ſuch narrow boundaries, all the various and important learning which ſprung up in the age that intervened between his predeceſſor and himſelf. He found himſelf compelled to introduce new Titles, and diſtributions of his ſubject; theſe it muſt be confeſſed are not always happily ſelected, nor ſufficiently diſcriminating. But over ſuch as he had adopted, the compilers of a ſupplement to his Work, could neither exerciſe diſcretion, nor controul. It was their duty to claſs the Modern Caſes under them, wherever it could be done conſiſtently with a lucid diſpoſition, into a tolerably connected ſeries.

In ſome inſtances however ſubjects have ariſen, which it was impoſſible to lay preciſely down according to this narrow and inaccurate ſcale of Arrangement. Moſt important parts of the Law have been almoſt newly created, while others have been doubled in extent of Learning, and variety of diſtinction ſince Mr. VINER wrote; ſuch, for inſtance are, *Deviſe*, *Inſurance*, *Recovery*, *Settlement of the Poor*, and many others. In Caſes of this kind the Author's Titles have been ſubdivided into Sections, by which means an eaſy reference to the Original is preſerved, an intercourſe between the parts of both works is facilitated, and no violent departure from the original Plan has taken place, unleſs in a few inſtances.

In the remainder of their task the Compilers of the Supplement had less difficulty to encounter. In abridging Reported Cases, they have endeavoured to give a faithful statement of circumstances, and to disclose the reason of the Judgment, without incumbering their abstract with unnecessary and useless detail. They have inserted marginal references to the page and volume of the original Work, in which each subject commences that is continued in the Supplement. A Table of the General Titles, and another of the Principal Matters has been added. A laborious Index of the Names of Cases, with reference to the subjects to which they relate, and under which they are to be found, is also given.

FEB

ADVERTISEMENT

From the PROPRIETORS.

PREVIOUS to the Republication of Mr. VINER's Abridgment, an application was made to the Vice Chancellor of Oxford, by whom in the moſt liberal manner the relinquiſhment of that Undertaking, on the part of the Univerſity, was made in favour of the preſent Proprietors. In conſequence of that arrangement it became an object, on the ſuggeſtion of many of the Purchaſers of that Work, to render it as complete as poſſible by producing a Supplement, containing the determinations ſubſequent to that Compilation. To facilitate that purpoſe, and with the view of obviating as much as poſſible, every probable cauſe of delay in the Execution, on the recommendation, and with the advantages of profeſſional advice and aſſiſtance, a plan was adopted for dividing the undertaking into five diſtinct parts, and diſtributing them accordingly into the hands of ſeveral Gentlemen of acknowledged talents, who in conformity with that plan, and a liberal deſire of exerting their profeſſional abilities, ſelected each his department. The Titles, ſo allotted and executed under each diviſion, are for the moſt part reſpectively diſtinguiſhed by an appropriate letter placed in the margin, at the commencement of thoſe Titles, according to the arrangement below mentioned *.

* 1. Practice and Pleading,	James Edmund Watſon, Eſq.		A
2. Crown Law.	Samuel Comyn, Eſq.	}	G
	James Sedgwick, Eſq.	}	
3. Chancery and Equity,	Henry Alcock, Eſq.	-	C
	John Wyatt, Eſq.	- -	F
4. Conveyancing, -	James Humphreys, Eſq.	-	B
5. General Law, including all Titles not comprehended under the above Diviſions,	Alexander Anſtruther, Eſq.	}	D
	Michael Nolan, Eſq.	}	E
	James Sedgwick, Eſq.	}	

To avoid and to correct such accidental redundancies, and unnecessary repetitions as might arise from this Plan, one of those Gentlemen further undertook that distinct task, and to connect the Titles by suitable references to the respective parts of the Work; another Barrister of known learning and accuracy being also retained to correct casual mistakes, and to superintend the press.

The prefatory account in the preceding pages, has it is presumed, sufficiently detailed, the method adopted and the discretion exercised in the execution of the several parts of the undertaking. It is however thought necessary on the part of the Proprietors, to apologize for the delays which have attended the progress of it, which by subsequent experience have been found to arise out of the complex nature of the undertaking itself, and which have been much increased by the repeated necessity of procuring further assistance to supply the engagements of several of the gentlemen originally concerned, who from advancement in professional business, by promotion, and other unforeseen changes of situation and circumstances, have found it necessary to relinquish a share of the task originally undertaken by them.

These exigencies, and others now unnecessary to enumerate, have been met on the part of the proprietors, in a manner suitable to the object of the undertaking and by measures adequate to those occasions; and it is presumed that the additional exertions of professional industry, which they have produced, will be found a considerable accession to the improvement of the Work.

Michaelmas Term,
1806.

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Quare Impedit.

(B. d. 4) Proceſs and Proceedings. 17 Vin. 428.

1. WHERE the patron has preſented one incumbent, and the univerſity preſented another after, the biſhop has his election to take one preſentee or the other; and if the biſhop admits and inſtitutes the preſentee of the univerſity, the patron cannot maintain a *quare impedit*, becauſe there was no diſturbance. *Filzherbert* v. *Reeves*, 1 *Com. Rep.* 169.

2. In *quare impedit*, if the plaintiff be outlawed pending the writ, that outlawry gives the king a title. *Ibid.*

3. But on reverſing the outlawry, the plaintiff ſhall have execution of his judgment, and the king's incumbent ſhall be removed. *Ibid* in note.

4. If the Archbiſhop of *Canterbury* be plaintiff in a *quare impedit*, the writ muſt be awarded to the other archbiſhop. *Per Holt* C. J. 1 *Show.* 329.

5. If a *quare impedit* ſhould be brought againſt the Archbiſhop of *York* as a diſturber, the writ ſhall be directed to the Archbiſhop of *Canterbury*. *Ibid.*

6. A *quare impedit* by the king againſt the *incumbent*, to preſent by reaſon of ſimony, need not make the *patron* a defendant. *The King* v. *Sowton*. 2 *Show.* 167.

7. If the right of nomination be in one, and of preſentation in another, and either impede the other in his right, a *quare impedit* lies. *The King* v. *The Marquis of Stafford and T. Gifford, Eſq.* 3 *Term Rep.* 646.

8. Where the right of nominating is in *A.*, and of preſenting in *B.*, *B.* is to judge of the qualification of the perſon nominated in the ſame manner as a biſhop does; but if the perſon preſenting object to the nominee on the ground of immorality, that muſt be tried by a jury. *Ibid.*

(B. d. 8) Pleadings. *Count.* 17 Vin. 439.

1. WHERE an act of parliament unites three churches, and gives the firſt preſentation to the patron of the church of which the living was of the higheſt value, without taking any notice of the others, and it appears on the face of the declaration

that a certain order of preſentation has taken place under the act of parliament which has been acquieſced in, that is ſufficient ground for preſuming that the order ſet forth is the true order, according to the meaning of the act of parliament. 3 *Wilſ.* 233.

2. *The Warden, &c. of the Myſtery of Grocers* v. *The Archbiſhop of Canterbury*, and *W. Backhouſe, Clerk.* In this caſe, three objections were taken to the count. 1ſt. That it is not alleged therein that the plaintiffs were ſeiſed of the advowſon to *preſent* in *their third turn.* 2dly. That the plaintiffs have not ſhewn any title to the *third turn.* 3dly. That this is not the *third turn.* Which objections were all over-ruled. (See the pleadings at full length. 3 *Wilſ.* 214.)

3. Long acquieſcence is evidence of an agreement to preſent in the order and rotation of *turns* as alleged in the count. 3 *Wilſ.* 234.

4. Subſcribing the articles need not be alleged in the plea, nor in the declaration. *Rex* v. *Armagh*, 2 *Stra.* 837.

5. It is generally neceſſary for the crown to allege a preſentation in a *quare impedit*, as well as a ſubject; a *commendam retinere* does not amount to one. But where the verdict finds that the crown was ſeiſed in fee, *ut de uno groſſo*, it cures the want of the allegation. *Rex* v. *Biſhop of Landaff*, 2 *Stra.* 1006.

27 Vin. 442. (B. d. 9) *Quare impedit.* Pleas. Good in general.

IN pleading a right in coparceners to preſent to an advowſon by turns, it is good to ſtate that the right aroſe becauſe they *did* not agree to preſent, which is ſynonimous to ſaying they *could* not agree. 1 *H. Bl.* 376.

27 Vin. 445. (B. d. 11) Pleadings by the Biſhop.

1. THE declaration having ſet forth that *B.*, the late archbiſhop, was ſeiſed as of fee, in right of his archbiſhoprick, of the advowſon of the church of *A.*, *&c.* and the archbiſhop in his plea admits this ſeiſin, and a vacancy by promotion, as alleged in the declaration, but inſiſts that the crown by patent granted to *D.* the deanery of *A.* with all its rights, members, *&c.* by virtue whereof he was poſſeſſed of the church of *A.* as a member of the deanery, *&c.* this is ill, as it neither ſhews a preſentation, or that the church is a member of the deanery. *Rex* v. *Archbiſhop of Armagh* and *N. Wheley, Clerk.* 2 *Stra.* 837.

2. In *quare impedit*, the biſhop pleaded that he claimed nothing but as ordinary, and it was holden bad, for want of alleging notice of the refuſal, though in a caſe where the crown preſented. *The King* v. *Biſhop of Hereford.* 1 *Com. Rep.* 358.

(B. d. 15) Pleadings. Traverſe. *Good.* In what Caſes. 17 Vin. 454.

1. "WITHOUT this, that it belonged to the plaintiffs to preſent to the church at the ſecond *turn*, when the ſame became vacant by the death of *T. P.* as the defendant hath alleged in his plea," is a good and material *traverſe*. It is a traverſe of a matter of right, reſulting from facts, and not of matter of law only. 3 *Wilſ.* 234.

2. In *quare impedit* by the king for the next turn of a living void by promotion defendant pleads that the crown preſented *D.* who is ſince dead, and that he himſelf is now preſented, *&c. parſon imparſonée*, with a *traverſe* that the church is ſtill vacant by promotion; this is a confeſſion and avoidance, and the traverſe being therefore bad, it may be paſſed over, and iſſue taken upon the avoidance. *Rex* v. *Archbiſhop of Armagh, &c.* 2 *Stra.* 837.

3. In *quare impedit* the plaintiff having ſtated his title in the declaration, the defendant pleads his own title in bar, in deducing which ſeveral incidental points are alſo ſtated: the plaintiff, in his replication, ſets forth eſſential matter, which would fully avoid the defendant's title, but does it by way of inducement to a traverſe of one of thoſe incidental points, with which traverſe the replication concludes; the defendant, in the rejoinder, takes no notice of the traverſe in the replication, but *traverſes the matter of inducement*, which precedes it. This rejoinder is good, and may well *paſs by the traverſe* in the replication, that traverſe being an immaterial one. *Thrale* v. *Biſhop of London*, 1 *H. Black.* 376.

(B. q. 19) Judgment. *When* and *how*, and of the *Entry* thereof. 17 Vin. 462.

2. IN a *quare impedit* brought againſt *A.* and *B.*, tenants in common of an advowſon, (being aſſignees of two co-parceners, who do not agree to preſent) *A.* ſuffers judgment by default, and *B.* dies pending the writ. This judgment is a bar to another *quare impedit* brought by *A.* and *C.*, the repreſentatives of *B.*, (in which *A.* is ſummoned and ſevered) to recover the ſame preſentation, but is not a bar to *C.*'s right to recover on the next avoidance in his turn. *Barker* v. *Biſhop of London*, 1 *H. Black.* 412 (*n*).

2. *A. B.* and *C.*, three ſiſters, are co-parceners of an advowſon. *A.* marries *D.*, on whom *A.*'s third is ſettled: *B.* marries *E.*; and *C.* dies, having deviſed her third to *F.*, the ſon of *B.* and *E.* *D.*, *E.*, and *F.* being thus entitled under or in right of the ſeveral original co-parceners, a *quare impedit* is brought by *G.*, a ſtranger, againſt *D.* and *E.* *E.* dies pending the writ, and the ſhare of *B.* (previouſly deceaſed) thereupon deſcends to *F.* in addition to the ſhare deviſed to him by *C.* *D.* ſuffers judgment by default. This judgment againſt *D.* is a bar to a *quare impedit* brought by *D.* and

F. (in which *D.* is ſummoned and ſevered) to recover the *ſame preſentation*, but is not a bar to *F.*'s right to recover on the next avoidance in his turn. *Barker & al.* v. *London* (*Biſhop*) *& al.* 1 *H. Black.* 412. (and *Willes's Rep.* 659.)

17 Vin. 464.

(B. d. 21) Of Damages and Coſts, &c.

1. ON *quare impedit* ſix months are underſtood to be ſix *calendar* months. But that is becauſe it is manifeſt by the words of the ſtat. *Ed.* 1. (*W.* 2.) *c.* 5. that by ſix months, *half a year* is there meant. The words are, "If he recover his preſentation within ſix months, damages ſhall be given to *half a year's value* only." 3 *Burr.* 1455.

2. Although the defendant have judgment in demurrer on a *quare impedit*, he is not entitled to coſts (under ſtat. 8 & 9. *W.* 3. *c.* 11.) *Thrale* v. *Biſhop of London*, 1 *H. Black.* 530.

[G]

Que Eſtate.

18 Vin. 136.

(C) Pleadable. How.

1. FREEHOLD tenant of a manor muſt plead preſcription, and by way of *que eſtate*, and not by way of cuſtom, which is only for copyholders. *Thomſon* v. *Roberts*, *Hil.* 5 *G.* 2. *Fort.* 339.

2. A plea of preſcription for common in a *que eſtate* is good after verdict, though it be not in expreſs terms alleged, that the owners of the eſtate have uſed it from time immemorial. *Clark* v. *King*, 3 *Term Rep.* 147.

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18 Vin. 141.

Quia timet.

1. WHERE there has been a poſſeſſion of a fiſhery for a conſiderable length of time, a perſon who claims a ſole right to it, may bring a bill to be quieted in the poſſeſſion, though he has not eſtabliſhed his right at law, and it is no objection upon demurrer to ſuch a bill, that the defendants have diſtinct rights, for upon an iſſue to try the general right, they may at law take advantage of their ſeveral exemptions and diſtinct rights. 1 *Atk.* 282. 1737. *Mayor of York* v. *Pilkington and others.*

2. A tenant in tail out of poſſeſſion cannot bring a bill to perpetuate the teſtimony of witneſſes, till he has recovered poſſeſſion by ejectment. 1 *Atk.* 571. 1738. *Brandlyn* v. *Ord.*

3. A wife

3. A wife who was executrix was reſtrained from getting in the aſſets of a teſtator, her huſband being in the *Weſt Indies*, and not ameſnable to the proceſs of this court. 2 *Atk.* 213. 1741. *Taylor* v. *Allen.*

4. Bill to be relieved againſt a promiſſory note given on a marriage brocage agreement; on motion, the defendant was reſtrained from parting with or aſſigning the note, till anſwer and further order. *Ambl.* 66. 1747. *Sir Edward Smith* v. *Haytwell.*

5. A partner, after the partnerſhip had ceaſed, gave a joint note. Bill filed to ſtrike out the plaintiff's (the former partner's) name, to have the bill retained for a year, and a trial had; when the plaintiff at law could not prove the partnerſhip, and was nonſuited: yet *Lord Chancellor* (on equity reſerved) refuſed to decree the name to be eraſed. 3 *Bro. Cha. Rep.* 15. 1789. *Ryan* v. *Mackmath.*

6. Injunction to reſtrain defendants from negotiating a bill of exchange given for goods not delivered, iſſued on certificate of bill filed. 3 *Bro. Cha. Rep.* 476. 1792. *Patrick* v. *Harriſon and others.*

7. The creditors of *A.* cannot maintain a bill againſt the repreſentatives of *B.*, to a part of the reſidue of whoſe eſtate *A* is entitled. 3 *Bro. Cha. Rep.* 624. 1792. *Elmſlie and others* v. *M'Auley.*

8. Creditor filing a bill againſt executor cannot make a debtor of the debtor a party, in caſe of inſolvency of the executor, the court, on motion, will grant a receiver, and compel the executor to allow his name to be uſed in bringing actions. 2 *Veſ. jun.* 95. 1793. *Utterſon* v. *Mair.*

Rape. [G]

(A) What is or ſhall be ſaid to be Rape, and of what Perſons; and Puniſhment thereof, &c. 18 Vin. 153.

1. AN infant under the age of 14 years is preſumed to be unable to commit a rape, and therefore cannot be guilty of it. But he may be a principal in the ſecond degree, as aiding and aſſiſting. 1 *H. P. C.* 630.

2. If death enſue from the violence with which a rape is committed, whether the offender can be indicted for *murder*. *Qu. Lade's* caſe. *Vid. Leach's Cr. Ca.* 112.

3. On an indictment for a rape, the depoſition of the girl taken before the committing magiſtrate, and ſigned by him, may, after

her death, be read in evidence at the trial of the priſoner, although it was not ſigned by her, and ſhe was under twelve years of age, provided ſhe was ſworn, and appeared competent to take an oath; and all the facts neceſſary to complete the crime may be collected from her teſtimony ſo given in evidence. *Fleming* and *Windham's* caſe. 1 *Leach's Cr. Ca.* 996.

Receivers.

18 Vin. 160. (A) Receivers. And of appointing Receivers by the Court of Chancery, and Caſes relating to them.

1. THE appointing a receiver is not in all caſes a turning the party out of poſſeſſion, as where a receiver is appointed of an infant's eſtate; in ſuch caſe the receiver's poſſeſſion is the poſſeſſion of the infant; but on the appointing a receiver in an adverſary ſuit, as where the plaintiff in ejectment has recovered a verdict, here the receiver's poſſeſſion ſeems to be the poſſeſſion of him that has the right to it. 3 *P. Wms.* 380. *Trin.* 1735. *Sharp* v. *Carter.*

2. There is no inſtance of the court's appointing a receiver of an infant's eſtate, where there is no bill filed. 1 *Atk.* 578. *May* 1738. *Anon.*

3. A receiver appointed to collect in aſſets and to bring actions in the name of an executrix, muſt give ſecurity to indemnify the executrix on account of ſuch actions. 2 *Atk.* 213. *Oct.* 1741. *Taylor* v. *Allen.*

4. The court has no juriſdiction to appoint a receiver unleſs a cauſe be depending. 2 *Atk.* 315. *June* 1742. *Ex parte Whitefield.*

5. The defendant ordered to pay 1000*l.* he has collected of the teſtator's money into the bank in the name of the accountant-general, and his lordſhip appointed a receiver of the whole eſtate, to pay in from time to time what he receives, *whilſt the will is conteſting in the eccleſiaſtical court.* 2 *Atk.* 379. *Nov.* 1742. *Montgomery* v. *Clerk.* See *Pleading*, 16.

6. The courſe of the court requires a ſecurity by the receiver, and two ſureties in a recognizance; and the taking an aſſignment of a mortgage belonging to a receiver, was held very improper, and ought not to have been done. 3 *Atk.* 237. *July* 1745. *Mead* v. *Lord Orrery.*

7. A receiver during the infancy of the plaintiff, who had no guardian, was directed to place out the ſurplus of the rents, when the ſame ſhould amount to a competent ſum, on government or other

other ſecurities; having never placed it out at intereſt according to the decree, the court directed that he ſhould pay intereſt at 4*l. per cent.* from the time of the decree till the infant came of age. 3 *Atk.* 274. *Nov.* 1744. *Hicks* v. *Hicks.*

8. It is no excuſe for the receiver that the Maſter did not give any directions about it, for it was his duty to remind the Maſter to lay out the ſurplus rents, when it amounted to a competent ſum. *Ibid.*

9. That buildings and farms are in a ruinous condition, and tenants often breaking, will not juſtify a receiver's keeping a balance in his hands, for it is not to be ſuppoſed he could exhauſt the whole received from the rents of the eſtate. *Ibid.*

10. The receiver's ſettling the accounts and delivering the vouchers to the plaintiff, when he came of age, and his admitting the balance and receiving it without objection, had no weight, as this tranſaction was two days only after he came of age. *Ibid.*

11. A receiver appointed by this court ſhall not make good a loſs which was not owing to any default of his, for where the rents he has in his hands are large, it is a neceſſary precaution to remit them by bills to *London* rather than in ſpecie. 3 *Atk.* 480. *April* 1747. *Knight* v. *Lord Plymouth.*

12. Where a receiver pays money to a tradeſman, and takes bills for the ſum; if he was in credit at the time, though he fails ſoon after, it ſhall not affect the receiver. But if the money had been loſt by his wilful default, and placing it in what he knew at the time to be an improper hand, the court will oblige a receiver to anſwer the loſs out of his own pocket. *Ibid.*

13. A commiſſion of bankruptcy cannot ſuperſede a decree of this court for a receiver, which is a diſcretionary power exerciſed by this court, with as great utility as any ſort of authority that belongs to it, and is proviſional only, and does not affect the right of parties. 3 *Atk.* 564. *Aug.* 1747. *Skip* v. *Harwood.*

14. A receiver may be granted on motion, notwithſtanding the reſervation of all matters under the decree, for this is a mere proviſional order. 3 *Atk.* 690. *Mich.* 1748. *Cooke* v. *Gwyn.*

15. A receiver appointed by this court has power to diſtrain for rent, and need not apply for a particular order for that purpoſe, unleſs there be a doubt, who has a legal right to the rent. 3 *Atk.* 750. *Jan.* 1752. *Pitt* v. *Snowden.*

16. This court is not to appoint a receiver on account of a diſpute in the eccleſiaſtical court concerning the probate. 1 *Veſ.* 324. 1749. *Knight* v. *Dupleſſis.* *Vide* 2 *Atk.* 379. *Montgomery* v. *Clerk.*

17. A receiver is not to be appointed by an heir at law, to turn a deviſee out of poſſeſſion. 2 *Veſ.* 360. *July* 1751. *Knight* v. *Dupleſſis.*

18. Sureties for a receiver not diſcharged at their requeſt. 2 *Veſ.* 401. *Auguſt* 1751. *Griffith* v. *Griffith.*

19. Where the owner of an eſtate is in poſſeſſion of part of the premiſes and a receiver appointed, application ſhould be made

for the owner to deliver poſſeſſion to the receiver, who cannot diſtrain on the owner, as he is not tenant to him. *Ibid.*

20. Court will not appoint a receiver when the matter in diſpute depends on a legal title, unleſs ſtrong grounds of title are ſhewn, and the rents are in danger. *Ambl.* 311. *July* 1756. *Mordaunt* v. *Hooper.*

21. Under particular circumſtances a receiver was continued of an infant's eſtate, on giving ſecurity *by his own recognizance only.* *Ambl.* 599. *July* 1759. *Counteſs of Carliſle* v. *Lord Berkley.*

22. Motion for a receiver granted before anſwer. *Compton* v. *Bearcroft, Trin.* 1773. and 2 *Bro. Ch. Rep.* 158. *March* 1787. *Vaun* v. *Barnett.*

23. The Maſter's report of his approbation of a receiver muſt ſtand till the perſon is impeached as improper. 2 *Bro. Ch. Rep.* 253. *July* 1787. *Creuze* v. *Biſhop of London.*

24. In a cauſe reſpecting an account of a partnerſhip, both parties being dead, a receiver ſhall be appointed; otherwiſe, if one be ſurviving. 2 *Bro. Ch. Rep.* 272. *Mich.* 1787. *Philips* v. *Atkinſon.*

25. Order for a receiver to diſtrain granted, but the diſtreſs to be in the name of the perſon having the legal eſtate. 3 *Bro. Ch. Rep.* 87. *Trin.* 1790. *Hughes* v. *Hughes.*

26. A receiver cannot proceed in ejectment, but a motion by a remote remainder-man, and tenants to reſtrain him from ejecting tenants, refuſed with coſts, their intereſt being too remote. 3 *Bro. Ch. Rep.* 88. 1790. *Wynn* v. *Lord Newborough.*

27. A receiver is to let the eſtate to the beſt advantage: but he cannot raiſe the rents upon ſlight grounds, nor turn out tenants, nor let even for one year without application to the Maſter. *Ibid.*

28. Where a receiver is appointed upon application of a mortgagee, and embezzles the rents, the loſs muſt fall on the mortgagor. 3 *Bro. Ch. Rep.* 365. *Mich.* 1791. *Rigge* v. *Bowater.*

29. Exception will not lie to a Maſter's report of the appointment of a receiver, without ſhewing that the perſon appointed is improper. 3 *Bro. Ch. Rep.* 508. 1792. *Thomas* v. *Dawkins.* See *Pleadings*, 37.

30. The Maſters, on the ſecond ſeal after *Trinity* term in every year, are to certify to the court the ſtate of the receivers' accounts in their reſpective offices. *General Order.* 4 *Bro. Ch. Rep.* 157. *Dec.* 1792.

31. Receiver muſt pay in his money yearly, and muſt pay nothing out without an order: he ſhall pay intereſt for money kept in his hands even a quarter of a year after it ought to have been paid in: inquiry directed as to that, though he had paſſed his accounts, and all parties declared themſelves ſatisfied. 1 *Veſ. jun.* 85. *Dec.* 1789. *Fletcher* v. *Dodd.*

32. Manager of an eſtate in the *Weſt Indies* is not to give ſecurity faithfully to manage: ordered to account for the produce, and to conſign ſo far as the management requires it, but muſt have

have a diſcretion as to what is to be applied there. 1 *Veſ. jun.* 139. *May* 1790. *Morris* v. *Elme.*

33. The Maſter's judgment is concluſive in appointing a receiver, unleſs ſome ſubſtantial objection is ſhewn. It is no objection to a receiver that he is a practiſing barriſter, but the ſolicitor in the cauſe cannot be receiver. 2 *Veſ. jun.* 137. 1793. *Garland* v. *Garland.*

34. Appointment of a receiver in the place of the ſequeſtrators, diſcharges the ſequeſtration. 3 *Veſ. jun.* 1795. *Shaw* v. *Wright.*

35. The court will not control the Maſter's appointment of a receiver, without a ſpecial caſe. The truſtee cannot be receiver. 3 *Veſ. jun.* 515. *Aug.* 1797. *Anon.*

36. Exception to the Maſter's appointment of a receiver diſallowed. 3 *Veſ. jun.* 588. *Feb.* 1798. *Wilkins* v. *Williams.*

Recognizance. [G]

(A) Who may take Recognizance; at what Place, and how to be made perfect. 18 Vin. 166.

1. IN *B. R.* all recognizances are entered as taken in court: but in *C. B.* they enter them ſpecially when taken, and their recognizances bind from the caption: but thoſe in *B. R.* from the time of entry. 2 *Salk.* 259. *Chetley* v. *Wood.*

2. The clerk of the recognizances is to keep three ſeveral rolls of the entering recognizances taken by the chief juſtices, *&c.* and the perſons before whom the recognizances are taken; and the parties acknowledging are to ſign their names to the roll as well as to the recognizance. *Stat.* 8 *G.* 1. *c.* 25.

3. As to the recognizance by *bail* in an action. If the action is in the Common Pleas, the recognizance is taken in a penalty or ſum certain, being double the amount of the ſum ſworn to, and contains a condition, that if the defendant be condemned in the action, he ſhall pay the condemnation money, or render himſelf a priſoner to the *Fleet*, or the bail will do it for him. Formerly the bail might enter into the recognizance jointly with the defendant, who was bound in double the amount of the ſum ſworn to, and the bail in the ſingle ſum; but now by a rule of that court the defendant is not permitted to enter into the recognizance at all, but each of the bail muſt enter into the recognizance in double the ſum ſworn to. 1 *Boſ. & Pull.* 530.

(C) Recognizance forfeited, though not according to the Letter of it.

1. RECOGNIZANCE is forfeited on the return of *ca. ſa.* *Barnes*, 106.

2. If one be taken up for a libel, and enter into recognizance to appear the firſt day of term, *ad reſpond.*, and not to depart, and the Attorney-General then exhibits an information, and then enters a *nolle proſ.* on it, and on the laſt day of term files another information for the ſame libel and another, and on this laſt information defendant is convicted, if he does not appear, his recognizance is forfeited. *Rex* v. *Redpath*, *Fort.* 358. *Vide* ſtat. 4 *G.* 3. *c.* 10. as to the eſtreatment of a recognizance, where the caſe is not attended with aggravating circumſtances.

13 Vin. 168.

(E) Proceedings and Pleadings.

1. DECLARATION on a recognizance againſt bail muſt ſhew at whoſe ſuit defendant became bail, and for what ſum the ſuit was brought. *Park* v. *Yerbury*, 1 *Wilſ.* 284.

2. If it do not appear on the record that there is a condition to the recognizance, on which an action is brought, the court will not intend that there is any condition. *Croſſe* v. *Porter*, *Willes' Rep.* 18.

3. *Scire facias* upon a recognizance cannot be teſted the ſame day the party makes default. *Rex* v. *White*, *Stra.* 1220.

4. On a recognizance to appear in *B. R.* on the laſt day of term, the party has till the laſt moment of it to appear in. *Ibid.*

5. If coſts have been incurred in the courſe of the proceeding, bail cannot get their recognizance diſcharged without paying them. *Rex* v. *Lyon*, 3 *Burr.* 1461.

13 Vin. 170.

(G) Equity.

1. THE ſecurity is to pay neither intereſt nor coſts on a recognizance forfeited, which was given on a plea to an extent. *Bunb.* 4. 1716. *Rex* v. *Albert.*

2. Where the offence was pardoned, the recognizance of the offender was diſcharged. *Bunb.* 88. 1721. *Rex* v. *Spencer.*

3. One taken upon a *ſupplicavit* and continued in priſon a year without any freſh threatning, diſcharged on entering into a recognizance before a Maſter in 100*l.*, with two ſureties in 50*l.* each, to keep the peace. 3 *P. Wms.* 103. 1731. *Ex parte Sir Rd. Groſvenor.*

3. On

4. On an appeal from a conviction for killing game on 13 *G.* 3. *c.* 80. the quarter ſeſſions may either order payment of the penalty, or impriſonment; therefore a recognizance of a ſurety, taken for trying the appeal, and paying the penalty with coſts, in caſe of affirmance, is bad. 3 *Anſtr.* 898. 37 *Geo.* 3. *Rex* v. *Bellamy.*

Record.

(F) Failure of Record. The Effect thereof. 18 Vin. 175.

1. IN an action on a judgment, if the declaration ſtate the judgment to have been recovered in a term different from that which appears on the record, it is a failure of record. *Raſtall* v. *Stratton*, 2 *H. Black.* 48.

2. If the record has a date in words at length, and the replication has the date in figures, and alſo in words at length interlined, and *George* the Second, now king, it is no variance: for the figures and the ſecond ſhall be rejected as ſurpluſage. *Fiſher* v. *Sowerby*, 1 *Burr.* 131.

3. Declaration for damages only, record for damages and coſts is not material. *Barnes*, 274.

4. Where there was a variance between the judgment and *niſi prius* roll, it was held fatal. As where the indictment ſet out that "the cauſe came on to be tried before *Lloyd* Lord *Kenyon*, C. J. *&c. William Jones* being aſſociated:" and in the judgment roll it was "*Roger Kenyon*," being aſſociated. This was held a fatal variance. *Rex* v. *Eden*, 1 *Eſp. N. P. Caſes*, 98.

5. Wherever there is a failure of record, the party pleading it has judgment againſt him.

6. Where a perſon declares as the editor of a newſpaper, (though the plaintiff need not have put that averment on the record "that he was the editor,") and another perſon proves himſelf to have been the editor, and ſo called, though the plaintiff was proprietor, and in fact reviſed the paper before its publication, it is a fatal variance. *Heriot* v. *Stuart*, 1 *Eſp. N. P. Caſ.* 437.

(I) Record removed. In what Caſes. How and when. Or, in what Court it ſhall be ſaid to remain. 18 Vin. 177.

1. THE court may take notice that the record is imperfect, and award a *certiorari* for their own ſatisfaction before errors aſſigned. *Bellew* v. *Scott*, 1 *Stra.* 440.

2. The court may award *certiorari* to bring the original before them *ad informand. conſcient. cur.*, though no diminution is alleged. *Franklyn* v. *Reeves*, 1 *Burr.* 118.

3. If

3. If a *certiorari* iſſues to uſe the record as evidence, then the tenor, if returned, is ſufficient, and countervails the plea of *nul tiel record*; but if the record is to be proceeded upon, the record itſelf muſt be removed, and this, whether it is before judgment or after: and in this caſe the writ muſt be ſuperſeded, and not quaſhed, which can only be done on a view of the record itſelf. *Woodcroft* v. *Kynaſton*, 2 *Atk.* 317.

4. The court of *B. R.* will not grant a *certiorari* to remove the record and proceedings out of a court leet, in order to inquire into the propriety of an amerciament, where the fine has been eſtreated into the duchy chamber of *Lancaſter*, and paid. 2 *Term Rep.* 184.

5. After judgment the record can only be removed by writ of error. *Rex* v. *Seton*, 7 *Term Rep.* 373.

6. Only a tranſcript of the *record* is removed into *Cam. Scacc.* on a writ of error from *B. R.* 1 *Dougl.* 352. (*n.* 3.)

(N) Of Pleading. *Nul tiel* Record.

1. IF plaintiff in an action againſt ſheriff ſays, that by precept of the king, &c. and on *nul tiel record* it appears to be a bill of *Middleſex*, judgment ſhall be *quod perfecit recordum*. *Harris* v. *Bernard*, 2 *Stra.* 1069.

2. So if in debt on judgment of *Hilary* term, and *nul tiel record* pleaded, it appears to be a judgment of *Eaſter* term. *Ince* v. *Hay*, *Trin.* 9 *G. Fort.* 353.

3. Recovery in *C. P.* being put in iſſue on *nul tiel record*, the court refuſed to order the officer of *C. P.* to attend in *B. R.* with the record; there muſt be a *certiorari*. *Hewſon* v. *Brown*, 2 *Burr.* 1034.

4. When the record is of *another* court, the plaintiff may either conclude his replication of *nul tiel record*, by giving the defendant a day to bring it in, or with an averment, and prayer of the debt and damages. *Sandford* v. *Rogers*, 2 *Wilſ.* 113.

5. It is ſufficient to inſert in the copy of the iſſue, by way of replication to a plea of *nul tiel record*, *Quod habetur tale recordum*, though not under counſel's hand. *Newbury* v. *Stradwick*, 2 *Com. Rep.* 532.

6. Where the record is of the ſame court, there ought to be a rejoinder that there is ſuch a record, &c. *Cremer* v. *Wicket*, 1 *Ld. Raym.* 550.

7. If the defendant plead in abatement, another action depending for the ſame cauſe, and the plaintiff afterwards diſcontinue ſuch action, the iſſue on *nul tiel record* muſt be found againſt him, becauſe the plea was true at the time of the pleading it; but if a recovery be pleaded in bar, and the judgment afterwards reverſed, before the day given to bring in the record, then upon *nul tiel record* the iſſue muſt be found for the plaintiff, becauſe by the reverſal

reverſal the record is void *ab initio*. *Green* v. *Watts*, 1 *Ld. Raym.* 274. 2 *Ibid.* 1014. 1 *Salk.* 329. S. C.

8. A foreign judgment is not a record, and therefore *nul tiel record* is no plea to an action on ſuch a judgment, though the plaintiff has called it a record in his declaration, and concluded *prout patet per recordum*. *Dougl.* 1. 7.

9. On *nul tiel record*, *Segrave* for *Seagrave* no variance, *quia idem ſonat*. *Williams* v. *Ogle*, *Stra.* 889.

10. When *nul tiel record* is pleaded, the party cannot demur to it. *Crockmere* v. *Wickens*, 3 *Salk.* 294. Of pleading *nul tiel record*, *vide Hambleton* v. *Lancaſhire*, *Ibid.*

11. When debt is brought on a judgment *nul tiel record* is the proper plea. And the iſſue is tried by producing the record itſelf, if it be a record of the ſame court; but if of another court, it muſt be certified into the court where the action is brought by *certiorari*. 2 *Burr.* 1034.

12. So to debt againſt a ſheriff on an eſcape on final proceſs, *nul tiel record* is a good plea; for in ſuch caſe the plaintiff declares on a judgment. *Maddox* v. *Young*, *Nol.* 209.

(O) Of Pleading *prout patet per Recordum*. 18 Vin. 185.

1. WHERE the action was on a judgment of the courts in *Jamaica*, and the declaration concluded with a *prout patet per recordum*, it was held to be wrong, and was rejected (and the defendant cannot plead *nul tiel record*). *Walker* v. *Witter*, 1 *Dougl.* 1. For no other records are received as concluſive evidence, but thoſe of the courts of *record in* England *only*; and therefore, though an action lies on the judgment of a foreign court, the record of that court is not concluſive evidence.

2. In debt on an *eſcape*, the plaintiff having declared that the priſoner was committed and eſcaped, and becauſe he did not ſay *prout patet per recordum*, the defendant demurred generally; but the plaintiff had judgment, for the giſt of the action was the eſcape, and the commitment only inducement. *Waites* v. *Briggs*, *Salk.* 565. And *per Holt.*—In this caſe, the debt on a judgment *quod cum recuperaſſet* is good without a *prout patet per recordum*, and the defendant may plead *nul tiel record*: So that it does not ſeem neceſſary to aver a record in the very words, as words tantamount, as *quod cum recuperaſſet* are ſufficient.

Recovery. Common.

28 Vin. 202. (G) Docked [or not]. Charges and Incumbrances.

Sect. I. Charges, *&c. barred.*

1. IF a married woman, having the truſt of a term in her, join her huſband in ſuffering a common recovery of the lands out of which the term is created, ſhe will be thereby barred of all her claim to it, for ſhe comes in by voucher, in privity of all her eſtates both legal and equitable. *Incledon* v. *Northcote*, 3 *Atk.* 430.

2. Lands were deviſed to ſeveral perſons ſucceſſively in tail; and a clauſe was inſerted by the teſtator, that, whenever the eſtates deviſed ſhould come to any of the perſons therein named, they ſhould take upon them the name of *W.* only. The firſt perſon to whom the lands were deviſed, in tail, ſuffered a common recovery of the eſtate tail, in which he was vouched, and vouched over, and never took the name of *W.* The perſon, who was next in remainder, entered for a breach of the *proviſo*, on account of the firſt deviſee's not having changed his name. It was agreed by the whole court, that if this *clauſe* were conſidered as a condition, it was collateral and ſubſequent, and was therefore well barred by the recovery. *Gulliver* v. *Shucberg Aſhby*, 4 *Burr.* 1929.

3. Teſtator deviſed as follows: "I give unto my daughter *A.* "all that my farm or eſtate called, *&c.* to hold the ſame from "and after the death of my wife, to the ſaid *A.* and to the heirs "of her body lawfully begotten, and for want of ſuch heirs, to my "right heirs for ever. *Item*, I give unto my daughter *B.* all that "my farm, *&c.* to have and to hold to the ſaid *B.* and to the "heirs of her body lawfully to be begotten; and herein my mind "and will is further declared, that, in caſe either of my ſaid "daughters *A.* or *B.* ſhall happen to die or depart this life, ſingle, "married, or widows, not leaving children or child living at their "deceaſe legally begotten, that then her gift, *&c.* herein, or eſtate "given her by this my will, ſhall be entirely void as to inheri-"tance of heirs, and of none effect; and the eſtate ſo given her, "ſo dying without heirs of her body, ſhall deſcend and go to my "heir male and his heirs male." *A.* ſuffered a recovery of the premiſes in queſtion, to the uſe of herſelf in fee, and afterwards died unmarried. The queſtion was, Whether this recovery barred the limitation over? Lord *Mansfield* ſaid, the validity of the recovery depended upon the queſtion, whether *A.* was tenant in tail,

tail, or tenant for life of the eſtate thus deviſed to her. Now the eſtate was given to her and the *heirs of her body*, which was an eſtate tail; nevertheleſs, the intention of the teſtator might reſtrain that eſtate of inheritance, and confine it to an eſtate for life only; and although it was inſiſted, that the teſtator had reſtrained the eſtate of inheritance during her life, yet he had only reſtrained it upon future contingencies, the firſt of which was the event of her own death; but until that contingency happened, the inheritance was in her; the ſecond was, upon her leaving no children. It was manifeſt, that the intention of the teſtator was, to prevent a common recovery being ſuffered; but, where a teſtator intends that which by law he cannot do, the law will not allow his intention to take effect. If, therefore, *B.* was tenant in tail to the hour of her death, nothing was ſo clear as that all conditions limited upon ſuch an eſtate tail, were avoided by the common recovery which had been ſuffered; and the court were of opinion, that *B.* took an eſtate tail by the deviſe. *Driver* v. *Edgar*, *Cowp.* 379. See *Doe* v. *Holmes*, and *Goodright* v. *Dunham*, ſtated in Suppl. tit. *Remainder*, (W) *poſt*. See alſo Suppl. tit. *Powers*, (A. 16) *ante*.

Sect. II. Charges, *&c. protected or let in.*

1. A perſon, who was ſeiſed to him and the heirs male of his body, remainder to his own right heirs, by leaſe and releaſe, previous to his marriage, conveyed his eſtate to truſtees, to the uſe of himſelf for life, remainder to the uſe of his intended wife for life, remainder to the firſt and other ſons in tail male. The marriage took effect, and they had iſſue a ſon. Nineteen years afterwards the huſband ſuffered a common recovery, and declared it to the uſe of *A. B.* and his heirs, in truſt to ſell the premiſes for the payment of his debts. *A. B.* ſold the lands, according to the truſts repoſed in him; the tenant in tail died, and his ſon claimed the lands. The court were unanimouſly of opinion, that the recovery enured to the uſes of the ſettlement, and therefore that the purchaſor had no title. *Goodright* v. *Mead and Shilſon*, 5 *Burr.* 1703.

2. A father, by ſettlement on his marriage, conveyed an eſtate to the uſe of himſelf for life, remainder to the firſt and other ſons of the marriage in tail. In 1733 the ſon, on his marriage, conveyed part of the eſtate, by leaſe and releaſe, to the uſe of himſelf for life, remainder to his intended wife for life, remainder to the heirs of the body of the wife, remainder to his own right heirs. In 1746, the father and ſon mortgaged the premiſes to *H. P.* for 1000 years, to ſecure 300*l.*, and ſuffered a common recovery, and declared the uſes to the mortgagee, and then to the father for life, remainder to the ſon in fee. Lord *Hardwicke* was clearly of opinion, that the recovery enured firſt to the uſes of the ſettlement in 1733. *Cheney* v. *Hall*, *Ambl.* 526. See *Goddard* v. *Complin*, ſtated in *pl.* 7. and ſide note of the *ſect.* to which this is a ſupplement, and *Butler*'s note, ſtated in (W) *poſt*.

3. In

3. In *Kynaſton* v. *Clarke*, (ſtated in ſuppl. tit. *Fines*, *f.* 2. *ante*,) Lord *Hardwicke* obſerved, that the ſon might have ſuffered a recovery, and barred the reverſion in fee; and then the father's creditors would not have come in; if he had levied a fine only, it would have barred the eſtate tail, but the reverſion in fee would be liable, (as affets.)

Sect. III. Other Effects are alſo attributable, in certain Caſes, to a common Recovery; as

1ſt. It may revoke a deviſe. See Suppl. tit. *Deviſe* (R 6.) *ante*.

2dly. It may work a forfeiture. See Suppl. tit. *Eſtate*, (F 6.) *ante*.

3dly. It may affect the courſe of deſcent. See Suppl. tit. *Heir*, (W 2.) *ante*.

18 Vin. 206. (I) Good or not. In reſpect of the Perſons ſuffering it, *or their Eſtates*.

1. *A.* *B.* being ſeiſed of the premiſes for life, with remainder to his firſt ſon *C.* in tail, remainder to his ſecond ſon *D.* in tail, forfeited in the rebellion in 1745. The eſtate for life being put up for ſale by the commiſſioners, was bought by *C.* (the tenant in tail) but in the name of a truſtee. *C.* thus having the equitable eſtate for life of his father, and the legal eſtate tail, ſuffered a recovery, and ſoon after died, leaving iſſue a daughter, wife to the plaintiff. *D.*, the ſecond ſon, took poſſeſſion, ſuffered a recovery, after the death of his father (during whoſe life the eſtate was in the truſtee,) and died, leaving two daughters, the defendants, who were in poſſeſſion. The bill was filed by *plaintiff* in right of his wife, for an account of profits, and to have the eſtate delivered up. Upon the hearing at the *Rolls*, his Honor ordered the bill to be retained for a year, with liberty for the plaintiff to try the validity of the recovery at law. But it was the opinion of the court, that *C.*'s eſtate for life being an equitable eſtate, and his eſtate tail a legal eſtate, did not enable him to ſuffer either a perfect legal, or a perfect equitable recovery, and therefore the recovery ſuffered operated nothing. *Salvin v. Thornton*, cited 1 *Bro. Ca. Cha.* 73. *Shapland* v. *Smith*, ſtated in Suppl. tit. *Deviſe*, (O. a. 2) *ante*, S. P.

2. By a ſettlement previous to the marriage of Lord *Bath*, certain eſtates were conveyed to the uſe of Lord *Bath* for life, remainder to the intent that Lady *Bath* ſhould receive a jointure, remainder for a term of years to raiſe portions for younger children, remainder to the firſt and other ſons of the marriage. Theſe eſtates being ſubject to ſeveral incumbrances, other eſtates were limited to truſtees in fee, upon truſt to ſtand ſeiſed thereof as a collateral ſecurity to protect the ſettled eſtates; and in order to diſcharge

diſcharge the ſaid incumbrances, it was declared, that the truſtees ſhould, by mortgage or ſale of the eſtates conveyed to them, raiſe ſuch ſums of money as ſhould be neceſſary to pay off the incumbrances: and it was agreed, that after all the incumbrances ſhould be paid, and all the other truſts ſhould be performed, the truſtees ſhould ſtand ſeiſed of ſo much of the ſaid eſtates as ſhould remain unſold, and of the equity of redemption of ſo much as ſhould have been mortgaged, upon truſt to ſettle and convey the ſame to Lord *Bath* for life, remainder to his firſt and other ſons in tail male. No ſale or mortgage was ever made by the truſtees; nor were any of the incumbrances paid off until 1787, when Lord *Bath* and his eldeſt ſon joined in a recovery of the eſtates which had been conveyed to the truſtees. The validity of this recovery was objected to, becauſe it was ſuffered before the debts were paid, and the objection was founded on a *dictum* of Lord *Hardwicke* in the caſe of *Bagſhaw* v. *Spencer*, ſtated in Suppl. tit. *Deviſe*, (B. b. 2) *ante*. Upon which caſe Lord *Hardwicke* obſerved, that the deviſe to *B.* was merely a truſt in equity; for, as the firſt deviſe was to the truſtees and their heirs, it carried the whole fee in point of law; that it could not be conſtrued an executory deviſe of the legal eſtate, for, in that caſe it would be too remote, being given after all debts ſhould be paid, which might, in point of time, exceed a life or lives in being, or any other time allowed by law. After which his lordſhip is ſtated to have ſaid theſe word, "That "the recovery ſuffered was before the debts were paid, and conſequently *B.* could not make a good tenant to the *præcipe* to "ſupport the recovery." Upon the authority of this paſſage, it was contended, that, whether the limitation to Lord *Bath* was conſidered as a ſpringing or ſhifting uſe at law, or a ſpringing executory truſt, it was not barred by the recovery ſuffered by Lord *Bath*; becauſe at the time of ſuffering the recovery, the event on which the limitation was to take effect, namely, the diſcharge of the debts, had not happened. On the other ſide, it was inſiſted, that the limitation to Lord *Bath* in the ſettlement, gave him an immediate veſted intereſt in the ſurplus of the eſtate after payment of the debts; that, in the caſe cited, both the Maſter of the Rolls and Lord *Hardwicke* agreed, that the deviſe to *B.* was an intereſt actually veſted in him. As to the idea of its being an executory deviſe of the legal eſtate, Lord *Hardwicke* ſaid, if the will was to be conſtrued in that manner, the deviſe would be too remote, being after payment of debts; but even admitting it to be a good executory deviſe of the legal eſtate to *B.*, yet it did not veſt in him, nor could his deviſee claim it, *becauſe the recovery was ſuffered before the debts were paid, and conſequently whilſt the fee was in the truſtees, ſo that he could not make a good tenant to the* præcipe. The meaning of the expreſſion of Lord *Hardwicke*, ſo much relied on, was therefore no more than this, that a perſon to whom an executory deviſe of a legal eſtate is made, cannot ſuffer a recovery until the event, on which the executory deviſe is directed to take effect, has happened. It was admitted, that there

was a ſtrict analogy between executory deviſes and ſpringing executory truſts; and thus that, if a deviſe of an eſtate, after payment of debts, was not good as an executory deviſe, a limitation of the ſame kind in a deed would be void as a future executory truſt. But it was added, that the payment of debts was not a condition precedent, which muſt be performed before a ſubſequent limitation or deviſe would take effect; but that ſuch ſubſequent limitation or deviſe was an intereſt commencing at the ſame time, and concurrent with the limitation or deviſe for payment of debts; and the words, *after payment of debts*, or *when the debts ſhall be paid*, only denote the order or courſe in which the ſeveral intereſts ſhall take place in point of *actual poſſeſſion* and perception of the profits, without preventing the ſubſequent eſtates, whether legal or equitable, from becoming veſted *in intereſt*, at the ſame time with thoſe which are prior to them in point of limitation. *Marquis of Bath*'s caſe, 1 *Collect. Jurid.* 214. *Cruiſe on Rec.* 3d edit. 275. S. C. See Suppl. tit. *Deviſe* (R c.), *ante*.

18 Vin. 209. (L) Recovery. Good; in reſpect of Limitations to Truſtees to preſerve Remainders.

A. Was tenant for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and every other ſon in tail male, remainder to his daughters in tail general, remainder to the heirs of his body, with remainders over. *A.* ſuffered a recovery with ſingle voucher, being himſelf tenant to the writ. The Houſe of Lords directed the judges to deliver their opinion, Whether this recovery was good to bar the remainders expectant upon the eſtate tail of *A.*? And the judges were unanimouſly of opinion, that it did not. And the Houſe of Lords decreed accordingly. *Meredith* v. *Leſlie*, 6 *Bro. Par. Ca.* 209.

18 Vin. 210. (M) Good; in reſpect of the Limitation to Baron and Feme.

TENANT in tail, with the remainder in fee in himſelf, conveyed the eſtate, *previouſly* to his marriage, to the uſe of himſelf and his intended wife for their lives, with remainder to the heirs of their bodies, remainder to themſelves in fee. After marriage, he ſuffered a recovery. This was held to bar only a moiety of the eſtate, according to the diſtinction taken in *Co. Litt.* 187. *a.* between a joint eſtate given to the huſband and wife *before* the marriage, and the like eſtate *during* the marriage; in the former inſtance they taking by moieties, but in the latter, their intereſt being entire, and not ſeverable. *Moody* v. *Moody*, *Ambl.* 649. See 18 *Vin.* 198. (D) and Suppl. tit. *Remainder*, (M) *poſt*.

(M 2.) Good; in reſpect of the *Writ of Entry*. [Suppl. Sect.]

BY a rule of the court of *C. B.* made *Trin.* 30 *G.* 3. It is ordered, "That, from and after the firſt day of *Mich. Term*, "then next enſuing, in every common recovery, wherein the "vouchee or vouchers ſhall perſonally appear at the bar of that "court for the purpoſe of ſuffering ſuch recovery, the writ of entry ſhall be ſued out, and produced at the time of the recording "of the vouchee's or voucher's appearance at bar, at the foot of "the *præcipe* in ſuch recovery."

(O) Good; in reſpect of the Vouchees. 18 Vin. 213.

1. BY a rule of the court of *C. B.* made in *Hil.* 14 *G.* 3. it is ordered, "That no common recovery wherein the tenant, or "tenants, vouchee, or vouchees, or any of them, ſhall appear and "defend by attorney, ſhall be arraigned at the bar, unleſs an "affidavit or affidavits in writing, on parchment, ſhall be made "and annexed to a copy of the *præcipe*, and warrant or warrants "of attorney, acknowledged by ſuch tenant or tenants, vouchee "or vouchees, by virtue of any writ or writs of *dedimus poteſtatem*, "in which affidavits the perſon or perſons making the ſame ſhall "ſwear, that he or they knew the party or parties acknowledging "ſuch warrant or warrants of attorney; that the ſame was or "were duly ſigned and acknowledged upon the day and year, or "ſeveral days and years mentioned in the caption, or ſeveral captions thereof; that the party or parties acknowledging, and alſo "the commiſſioners taking the ſame, were all of full age and competent underſtanding. That the *femes covert* (if any) were examined apart from their huſbands, and freely conſented to acknowledge the ſame. That all the ſaid parties knew the ſame warrant "or warrants of attorney was or were intended for ſuffering a common recovery to paſs his, her, or their eſtate or eſtates. And "further, that the razures or interlineations (if any) in the body "or caption of ſuch original warrant or warrants of attorney, "were made before the ſaid parties or any of them ſigned the "ſame, and before the commiſſioners ſigned the ſaid caption or "captions; which affidavit or affidavits (together with the ſaid "copy of the *præcipe* and warrant or warrants of attorney whereunto the ſame ſhall be annexed) ſhall be filed in the office of inrollment of writs for fines and recoveries."

2. And it is ordered, "That all ſuch affidavits as aforeſa'd ſhall "be made by ſome attorney or attornies of the courts of *Weſtminſter-hall*, or of the ſeſſions in *Wales*, or of the counties palatine of *Cheſter*, *Lancaſter*, or *Durham*, and ſhall be ſworn before "a perſon duly authoriſed to take affidavits in this court, except

" where the party or parties reſpectively, at the time of their acknow-
" ledging ſuch warrant or warrants of attorney, ſhall be in *Scotland*
" or *Ireland*, or in ſome other parts beyond the ſeas. And in caſe
" the ſaid party or parties ſhall be in *Scotland*, then the ſaid affi-
" davit or affidavits ſhall be made by one of the clerks of his ma-
" jeſty's ſignet, and ſworn before one of the judges, or other per-
" ſons duly authorized to take affidavits or depoſitions, in the
" court of Seſſion or court of Exchequer there. But if in *Ireland*,
" or in any other parts beyond the ſeas, then the ſaid affidavit or
" affidavits ſhall be made by one of the commiſſioners who hath
" taken the acknowledgment of ſuch warrant or warrants of at-
" torney, and ſhall be ſworn either before ſome perſon duly au-
" thorized to take affidavits in this court, or before ſome magiſtrate
" of the place, and in the preſence of a public notary, which
" notary ſhall alſo certify in writing, under his hand and ſeal, as
" well the due adminiſtering of the ſaid oaths, as alſo the name,
" ſignature, and office of the magiſtrate adminiſtering the
" ſame."

3. By the common law, a writ of *ſummoneas ad warrantizandum* had nine returns. By the ſtatute 16 *Car.* 2. *c.* 16. *ſ.* 10. the returns were abridged to five; and now by the ſtatute 24 *G.* 2. *c.* 48. *ſ.* 8. they are reduced to four incluſive; as if the writ of entry is returnable on the morrow of *All Souls*, then the writ of *ſummoneas* muſt be returnable from the day of *St. Martin* in 15 days, being the fourth and laſt return of *Michaelmas* term. And if there are three vouchers, the writ of ſummons for the ſecond vouchee is to be returnable four returns (both incluſive) from the return of the ſummons of the firſt vouchee; and the writs of ſummons are teſted four days incluſive, from the writ of entry.

4. A motion was made in *Eaſter* term, 18 *G.* 3. that the writ of ſummons in five recoveries might be teſted in the *Michaelmas* term preceding, and be made returnable in that *Eaſter* term, inſtead of the uſual courſe, authoriſed by the ſtatute 24 *G.* 2. *c.* 48. which is, that it ſhould be teſted the fourth day incluſive, from the return of the writ of entry, and be returnable the fourth return after the return of the writ of entry; in conſequence of which, writs of ſummons muſt be returnable either in the ſame term in which they were teſted, or, at fartheſt, in the very next term. The occaſion of this application was, that Earl *Cowper*, the vouchee, had acknowledged the warrants of attorney to appear to the ſummons, before commiſſioners appointed by *dedimus*, (which recited the ſummons as returnable in the preceding *Hilary* term,) at *Florence*, the 13th *December* 1777, but they did not arrive in *England* till after the end of *Hilary* term; and, as the return is uſually of the ſame term wherein the recovery is in fact arraigned at bar, and the *teſte* muſt precede the actual acknowledgment of the warrant of attorney by the vouchee, this proceeding could not be made regular, without ſuing out a writ of ſummons, with a much longer return than the courſe of practice would allow. The like inconvenience, it was obſerved, muſt occur, whenever the vouchee dwells

dwells in any diſtant country, as the *Eaſt* or *Weſt Indies*; but that objection had been uſed to be cured in a very unwarrantable manner, by altering the date of the caption after it arrived in *England*, ſo as to ſuit the term in which the recovery was arraigned, till the late rule of court in *Hilary* term, 14 *G.* 3. (which directs, *inter alia*, an affidavit to be made of the true time of taking the caption,) put a ſtop to this, among other groſs irregularities in the practice of ſuffering recoveries. The court conceived that they had not power to make ſuch a rule; or, at leaſt, that, as they could not foreſee all its conſequences, it would be highly imprudent to authorize ſuch a proceeding, by a previous direction from the bench; but intimated, that no blame ſhould fall on the officer, who ſhould make out the proceſs as prayed for, but the ſame to be at the hazard of the parties, and without prejudice to any future queſtion that might ariſe on the validity of ſuch recoveries. *Barnard* v. *Woodcock*, 2 *Black. Rep.* 1201.

5. A motion ſimilar to this was made in *Mich.* 19 *G.* 3. and met with the ſame reception from the court. The facts were, that the *dedimus* was teſted the 26th *February* 1777, and recited a writ of ſummons, returnable the firſt day of *Eaſter* term, 1777. The warrant of attorney was taken at *Bombay* the 17th of *December* 1777; ſo that, properly, the ſummons ſhould have been returnable, and the recovery had, in *Hilary* 1778, which the diſtance rendered impoſſible. Therefore, on application to the Maſter of the *Rolls*, he ordered the curſitor to make out a writ of entry, returnable in *Michaelmas* term 1777; upon which the officer made out a writ of ſummons, returnable the next *Hilary* term, of which term the tenant's appearance was entered. And then they imparled from *Hilary* to *Eaſter*, from *Eaſter* to *Trinity*, and from *Trinity* to *Michaelmas*, when the recovery was arraigned. And if the vouchee was then living, it was apprehended that the recovery would be valid; but if he was dead, it would be erroneous. *Gibbons* v. *Stevenſon*, 2 *Black. Rep.* 1223.

(P) Good; notwithſtanding the Death of one of the Parties. 18 Vin. 215.

1. SEE the firſt point in *Shelley*'s caſe, ſtated in the ſection to which this is a ſupplement, where the death of *A.* early in the morning of the day on which the recovery was paſſed, was held not to deſtroy the recovery; ſince the writ of entry was returnable on the octave of *St. Michael*, *viz.* the 7th day of *October*, and *A.* was then alive. See alſo Sir *Nich. Bacon*'s caſe, ſtated in 18 *Vin.* 235, 6. *pl.* 3.

2. In a writ of error to reverſe a common recovery, it appeared by the record, that a writ of entry *ſur diſſeiſin en le poſt* was brought by *A. B.* returnable *quinden. Paſch.* 13 *G.* 2. againſt *C. D.*, who appeared in perſon and vouched *E. F.* and *G.* his wife; whereupon a writ of *ſummoneas ad warrantizandum* was awarded, returnable in *craſtino aſcenſionis Domini* (which was on the 16th of *May*),

May), on which day the ſaid *E. F.* and *G.* his wife appeared by their attorney, and entered into warranty, and vouched over the common vouchee, who made default; whereupon judgment was given, and a writ of ſeiſin awarded, and the ſheriff returned that he had delivered ſeiſin. The error aſſigned in *B. R.* was, that *G.* died before judgment was given in the ſaid recovery; and for this the plaintiff in error prayed, that the recovery might be reverſed. Iſſue was joined, that *G.* did not die before judgment. A ſpecial verdict was found, that *G.* died on the 10th day of *May*, ſix days before the return of the writ of *ſummoneas ad warrantizandum*, but whether ſhe died before judgment or not, the jurors left to the opinion of the court. On behalf of the plaintiff in error, two points were made; *firſt*, that the death of *G.*, as found by the ſpecial verdict, made the judgment erroneous; *ſecondly*, that, upon the whole record, and the continuances as entered, the judgment appeared to be given, and the recovery paſſed, after the death of the vouchee; and could not be made good by relation, as a judgment or recovery in her life time. In ſupport of theſe poſitions, it was argued, that recoveries were erroneous, where the vouchee or other neceſſary party did not appear, either in perſon or by attorney, for, without an appearance, there could be no warranty, no vouching over the common vouchee, and conſequently no judgment. In this caſe, *G.* the vouchee, did not appear in perſon: the conſideration therefore was, whether the appearance of her attorney was a proper appearance. And it certainly was not, for the death of the vouchee, before the time when the attorney actually appeared, was a determination of the warrant of attorney, and thus ſhe appeared, neither in perſon nor by attorney. After ſeveral arguments, *Lee*, Ch. Juſtice, delivered the unanimous opinion of the court, and made three points: 1ſt. Whether the death of *G.* was error? 2d. Suppoſing it were error, yet, whether, by conſtruction of law, this judgment ſhould not have relation to the firſt day of the term, and whether the court would not intend the appearance of the vouchee *gratis*, and have no regard to the day given on the return of the ſummons? 3d. Whether the plaintiff in error were not eſtopped to aſſign the death of the vouchee to be on the 10th of *May* before judgment, when it appeared upon the face of the record, that ſhe appeared by attorney at the return of the ſummons, *viz.* 16th of *May?* And they were all, he ſaid, clearly of opinion with the plaintiff in error, 1ſt. That the death of the vouchee before judgment was error; 2dly, That the judgment could not be made good by relation to the 1ſt day of the term; and 3dly, That the death of the vouchee was a collateral matter, and not contrary to the record; and therefore the plaintiff was not eſtopped to aſſign it for error. *Wynne* v. *Wynne*, 1 *Wilſ* 35. *a.*

3. A writ of error was brought from *C. B.* to reverſe a common recovery; and the error aſſigned was, the death of the vouchee before judgment. The defendants pleaded *in nullo eſt erratum* (which confeſſed the error aſſigned to be true, in *fact*). Lord *Mansfield* ſaid, it was plain that judgment could not be given againſt

againſt a man after he was dead. That there could have been no judgment againſt the tenant to the *præcipe* in a common recovery, without a judgment over in value againſt the vouchee; they were all entered at the ſame time, and were part of the ſame proceeding. The recovery was unanimouſly reverſed; and *Wynne* v. *Wynne*, before ſtated, was cited as an authority in point. *Sheepſhanks* v. *Lucas*, 1 *Burr.* 410.

4. A writ of error was brought in *B. R.* to reverſe a common recovery, and the error aſſigned by the conſent was, "that the "day of the return of the writ of ſummons was on *Sunday* the "13th of *May* 1750, on which day the tenant in tail, who was "the vouchee in the common recovery, died." Two queſtions aroſe on this caſe. 1ſt. Whether the judgment could relate to the eſſoign day of the term, or to any day prior to the 13th of *May*, the eſſoign day of the return? 2dly. Whether by law a valid judgment could poſſibly be given on the day of the return, being *Sunday?* Lord *Mansfield* delivered the reſolution of the court, that the recovery was bad; becauſe no judgment could, in this caſe, be ſuppoſed to be given before the death of the vouchee. That this judgment could not relate to the firſt day of the term, becauſe it could not be given before the return of the writ of ſummons, which appeared, by the record, to be in the term; that it could relate only to the eſſoign day of the writ of ſummons, which was upon *Sunday;* and, as the the courts do not ſit on *Sunday*, judgment could not poſſibly be given until the *Monday*, when the vouchee was dead. To reverſe this judgment, a writ of error was brought in the Houſe of Lords; when, after hearing counſel, the judges were directed to deliver their opinions upon the following queſtion, *viz.* "Whether the recovery was good or erroneous, the return "day of the writ of ſummons being on *Sunday* the 13th of *May*, "on which day the tenant in tail died." And they all agreed in their opinion, that the recovery was erroneous. Whereupon the judgment in *B. R.* was affirmed. *Swann* v. *Broom*, 3 *Burr.* 1595. 1 *Black.* 496-526. S. C.

(R) Made good (or void) in *Equity.*

18 Vin. 217.

A Perſon, who was deaf and dumb, ſuffered a common recovery of intailed lands, aſſiſted by his uncle, and then ſettled the ſame to certain uſes. Upon the circumſtances of the caſe, it appeared he had done nothing but what, in conſcience, he ought to have done; yet, being thus ſituated, the Lord Chancellor ſaid, he ought to be taken care of in equity; and it appearing, that the uncle was concerned in point of intereſt, the ſettlement was ſet aſide. But, had he been aſſiſted by an able and faithful relation, that was not intereſted, equity would not have relieved him in ſo reaſonable an act as this appeared to be. *Ferres* v. *Ferres*, 2 *Ab. Eq.* 695.

18 Vin. 217. (S) Bar. Of what Things; or of *what* it may be ſuffered.

1. THE queſtion was, whether a common recovery, which had been ſuffered of an advowſon in groſs, and one acre of land, upon a writ of entry *ſur diſſeiſin*, was good. Upon ſearching for precedents, ſixteen were found, where recoveries of advowſons in groſs, and a little land, had been ſuffered upon writs of entry *ſur diſſeiſin*; and no caſe was found where ſuch a recovery was ever held bad. And *Downer*'s caſe, ſtated in 18 *Vin.* 218. ſide note to *pl.* 3. was ſaid to be in point. The court refuſed to hear any argument againſt the recovery; but ſaid, that, if this were *res integra*, perhaps it might not be right; yet, *quod fieri non debuit factum valet*; and gave judgment that the recovery was good. *Bayley* v. *The Univerſity of Oxford*, 2 *Wilſ.* 116.

2. In a writ of error from a judgment on *ſcire facias* in *B. R.* in *Ireland*, brought to reverſe four common recoveries in *C. B.* there, two of lands in the county of *Limerick*, and two of lands in the city of *Limerick*, Mr. *Buller* for the plaintiff in error objected, that the ſeveral deſcriptions in all the four recoveries were bad. There were fourteen parcels in each recovery, and the principal objections to them were, 1ſt, as to the premiſes in the county, becauſe ſome were demanded thus: "All thoſe the caſtle, town, "and lands of, *&c.*, containing, *by eſtimation*, ſo many acres," without ſetting out the quality of the lands: that a recovery could not be ſuffered of a town, and that ſo many acres, by eſtimation, was uncertain. 2dly, That others were deſcribed thus: "All "that part of the town and lands, *&c.*, now or late in the tenure "of *A. B.*," which was vague and uncertain. 3dly, That two parcels were deſcribed as containing "a plough land," which was alſo vague and uncertain. In reſpect of the premiſes in the city, he objected, that they were all demanded by the deſcription of "meſſuage or tenement," in which reſpect they were uncertain, and alſo, as being ſaid to be "now or late in the tenure," *&c.* He inſiſted, that a recovery has no effect until execution; therefore the deſcription of the premiſes ſhould be ſo certain, that the ſheriff may know how to execute it; and, if bad in ejectment, *a fortiori* in a *præcipe*. Lord *Mansfield*: "The objections are of two ſorts, and I have no doubt as to either. 1ſt, That the premiſes in the county are demanded thus: "all thoſe the *caſtle*, "*town*, and *land*, containing by eſtimation," *&c.*, which, it is argued, is uncertain both in reſpect of quality and quantity. As to that, it is admitted that "*caſtle*" is a good deſcription in *England*. *Town*, was determined to be a good deſcription in *Cottingham* v. *King*, 1 *Burr.* 623., and "*land*" means *arable* land. The next objection is, that the premiſes in the city are deſcribed thus: "all that meſſuage or tenement, with a garden or meadow there-"to belonging, ſituate, *&c.*, and now or late in the occupa-

"tion

" tion of," &c.; which, it has been contended, would be a bad deſcription in ejectment. There are many caſes in ejectment which have gone very far indeed: and therefore the doctrine of theſe caſes ought not to be extended. As to the authority in 3 *Wilſ.* 23. (cited for the plaintiff in error, where it was held that ejectment did not lie of *a meſſuage* or *tenement*,) which would have great weight on account of its being ſo recent, the judges in that caſe, decided againſt their own private opinion and inclination, becauſe they held themſelves bound by authority. But there, the words were only *meſſuage or tenement*, without any other deſcription. Here, there are other words, " with the appurtenances " and garden," &c., which ſhew, that " meſſuage or tenement" are two words for the ſame thing, and that both mean a dwelling-houſe. But this is not any fundamental ground of determination in the preſent caſe. What I ground my opinion upon is, the principles laid down in *Dormer's* caſe, 5 *Co.* 40. *b.*; reported alſo in *Popham*, 23.; and the diſtinction the court there takes between adverſe actions and common recoveries, which, at that time, were become a common aſſurance, and a conveyance of lands, &c. and which the court ſay, " being alſo made by *aſſent* between the par- " ties, ſhall, and always have had a different expoſition from " what is given to a recovery by *pretence* of title, or to the pro- " ceeding in any other real action, to which they are not to be " compared; therefore a common recovery may be ſuffered of an " advowſon, common in groſs, warren, and the like, and the in- " tent of the parties ſhall be obſerved." Now, the objection in this caſe is an objection to the very ſame deſcription as is uſed by the anceſtor in the deed which created the entail. The ſole object of the recovery is, to unfetter the premiſes ſo entailed; and therefore I will not depart from this anciently eſtabliſhed principle, to do ſuch cruel injuſtice both againſt the intention of the parties, and againſt public convenience." His Lordſhip then cited the caſe of *Addiſon* v. *Otway* afterwards ſtated in 18 *Vin.* 206. (H) *pl.* 3. and ſaid, this deciſion is an inſtance of liberality that would not have been adopted or followed in an adverſe *præcipe*. And the other judges concurring with his Lordſhip, the judgment of *B. R.* in *Ireland* was affirmed, *Maſſey* v. *Rice*, *Cowper*, 346. *Mich.* 16 *G.* 3.

See Suppl. tit, *Rent*, *poſt*.

(W) Tenant to the *Præcipe*. Good or not.

18 Vin. 221.

1. TESTATOR by his will deſired, that his executors would take care to ſee all his debts and legacies paid, by making ſale of his perſonal eſtate; and as his debts were great, he deviſed to his executors all his manors, &c. of *C.*, to be by them ſold, and the monies ariſing from ſuch ſale diſpoſed of in the payment of his debts and legacies; and leſt both his perſonal eſtate and the monies to ariſe from ſuch ſale ſhould not be ſufficient, the teſtator

gave

gave his executors full power to receive the meſne profits of his whole eſtate, lying in *P.* and *W.* The teſtator then deviſed the ſaid manors of *P.* and *W.*, after ſuch time as his debts and legacies ſhould be paid by the rents and profits thereof, to *A. B.* for his life, without impeachment of waſte; and in caſe *A. B.* ſhould have any iſſue male, then to ſuch iſſue male and his heirs for ever; and in caſe he left no iſſue male, then, after ſuch time as his debts and legacies were fully paid, he deviſed the manor of *P.* to *C.* in fee. *A. B.* the deviſee having got into poſſeſſion of the ſaid manors of *P.* and *W.*, ſuffered a common recovery of them, before the debts were paid, and declared the uſes thereof to himſelf in fee. This caſe having been heard in the Houſe of Lords, the judges were directed to give their opinion, "Whether the eſtate "for life was veſted in *A. B.* at the time of the recovery before "all the debts were paid, ſo that he could make a good tenant to "the *præcipe?*" And the judges were unanimouſly of opinion, "That the eſtate for life was veſted in him at the time of the re-"covery." *Carter* v. *Barnardiſton*, 1 *P. Wms.* 505.

2. We learn from Mr. *Cruiſe*, in his *Eſſay on Com. Recov.*, 2*d edit.*, *p.* 53. that in an opinion given by the late Mr. *Booth* on the ſubject of the power of a huſband, ſeiſed *jure uxoris*, to make a tenant to the *præcipe* of his wife's land, without a fine from the latter, that the report in *Ca. in Eq. temp. Talb.* of Lord *Talbot*'s argument, in the caſe of *Robinſon* v. *Comyns*, (ſtated from thence in *pl.* 22. of the ſect. to which this is a ſupplement,) is incorrect; that he himſelf (Mr. *Booth*) was preſent at the hearing of that caſe, and had a very full note of it; and that Lord *Talbot*'s words were theſe: "If I ſhould lay it down as a rule, that where the wife is "entitled to an eſtate tail in poſſeſſion, her huſband and ſhe could "not make a tenant to the *præcipe*, for the docking of the entail "without a fine, becauſe the law is ſuppoſed to appoint no other "method, by which a woman under coverture can convey her "freehold, but by fine, I ſhould ſhake many of the common re-"coveries of the kingdom; for, whatever may have been the "practice of ſome over-cautious conveyancers, yet I believe it "hath often been held, that the huſband alone may, by deed "only, and without any fine levied by the wife, convey a ſuffi-"cient freehold to the grantee, to make him tenant to the *præ-*"*cipe.*" Mr. *Butler* alſo, in note 1. *Co. Litt.* 326. *b.* obſerves, that Mr. *Booth*'s account of this argument is confirmed by a MS. note of *Robinſon* v. *Comyns*, in his poſſeſſion.

3. *Nathaniel* Lord *Say and Seal* conveyed his eſtate to *B. K.* for the purpoſe of making him a tenant to the *præcipe*, by a bargain of ſale, which was worded as follows:—"Witneſſeth, that for and "in conſideration of five ſhillings by the ſaid *B. K.* to the ſaid "Lord *N.* in hand paid, as alſo for the cutting off all entails, "and for the barring of all remainders and reverſions of, in, and "upon all and ſingular the premiſes, and for ſettling and aſſuring "the ſame to the ſaid Lord *N.* and his heirs, doth bargain, ſell, "and confirm unto the ſaid *B. K.*," *&c.* The court of *B. R.*

were

were of opinion, that this deed paſſed the freehold, becauſe ſuch was the plain intention of it. Upon a writ of error brought in the Houſe of Lords, it was contended, that this bargain and ſale could not convey any eſtate, becauſe it was not mentioned therein that any perſon did bargain and ſell the lands in queſtion. There appeared indeed the words *bargain and ſell*, but it was not ſaid *who* bargained and ſold; and conſequently Lord *N.* did not bargain and ſell. On the other ſide it was argued, that it appeared *primâ facie*, that the conſideration-money was paid by *B. K.* to Lord *N.*, and that it was for barring all entails and remainders in the premiſes, and aſſuring the ſame to Lord *N.* and his heirs; that it appeared as well by this deed itſelf, as by the evidence on the trial, that the manors and lands therein mentioned were the eſtate of Lord *N.*, and that the intent of the deed was to make *B. K.* tenant of the freehold, in order that a common recovery might be ſuffered: and the judgment in *B. R.* was affirmed. *Lloyd* v. *Viſcount Say and Seal*, 1 *Salk.* 341. 10 *Mod.* 40. 1 *Bro. Par. Ca.* 379.

4. Mr. *Butler*, in *Co. Litt.* 203. *b.* n. 1. continues ſome remarks which he had made in a former page, upon the effect of the entry of a feoffee for a condition broken, in the following manner: "It may be obſerved, that when a tenant for life joins with "a remainder-man in ſuffering a common recovery, it is ſome-"times practiſed as a precaution againſt letting in the incum-"brances of the remainder-man, to annex a condition to the "eſtate of the bargainee or releaſee, who is made tenant to the "*præcipe*, on the non-performance of which his eſtate is to be-"come void. For, if *A.* be tenant for life, with remainder in "tail to *B.*, and *B.* executes leaſes, confeſſes judgments, or other-"wiſe incumbers his eſtates, and afterwards *A.* and *B.* join in "ſuffering a common recovery, all the incumbrances of *B.* are "immediately let in upon the fee gained by the recovery; and "that fee, and every eſtate derived out of it, are ſubject to them. "To avoid which, *A.*, the tenant for life, by leaſe and releaſe, or "by bargain and ſale enrolled, conveys the eſtate to the intended "tenant to the *præcipe*, to hold to him and his aſſigns during the "joint lives of him and the grantor or bargainor; with a decla-"ration, that ſuch grant and releaſe, or bargain and ſale, is made "to enable the grantee or bargainee to be tenant of the freehold "in the propoſed recovery; and a declaration of the uſes to which "it is intended the recovery ſhall enure. Then a proviſo is in-"ſerted, that if the bargainee or releaſee do not, within ſix "months, pay the tenant for life 100,000*l.* or ſome other very "large ſum of money, the bargain and ſale, or grant and releaſe, "ſhall be void; and that it ſhall be lawful for the bargainor or "grantor to enter as in his former eſtate. The money is not paid "at the day appointed, and thereupon the bargain and ſale, or "grant and releaſe, is void, and the bargainor or grantor becomes "ſeiſed of his antient life eſtate. But, though the bargain and "ſale becomes void, yet, as, at the time of ſuing the original writ

"and

" and the *præcipe*, the bargainee or releasee was tenant of the " freehold, the subsequent cesser or determination of his estate " does not impeach the recovery. For, if the person, against " whom the *præcipe* is brought, be, at the time when the *præcipe* " is sued, or at any time before judgment, actually tenant of the " freehold, it is immaterial what becomes of it afterwards. This " doctrine has been carried so far, that, where a tenant to the " freehold was made by a fine, and the fine has been reversed, " yet the recovery was held good." (See *Lloyd* v. *Evelyn*, stated in 18 *Vin.* 223. *pl.* 15.) " The recovery, therefore, in " this case is good; the freehold upon which it was suffered is " determined; and the bargainor or grantor comes in of his " original estate, and of course avoids all the leases, judgments, " and other incumbrances of the tenant in tail. The reason why " the conveyance is made to the bargainee or releasee, during the " joint lives of him and the grantor or bargainor, is to preserve " his powers by leaving the reversion in him. For, supposing *A.* " to be tenant for life, with the usual powers of leasing, jointur- " ing, and charging, remainder to trustees to preserve contingent " remainders, remainder to *A.*'s first and other sons in tail male, " remainder to his daughters as tenants in common in tail, with " cross remainders in tail between them if more than one, with " remainders over; *A.* and his daughter may suffer a common " recovery; and it will be good against *A.* and his daughters, and " their issues in tail, and the remainders over. But the estates " tail of the sons being prior to the estates of the daughters, and " being supported by the estate of the trustees for preserving con- " tingent remainders, are not, whether vested or contingent, at the " time of the recovery affected by it. But if *A.* granted his whole " life estate to the tenant to the *præcipe*, it might be apprehended " that the power relating to his estate, whether appendant or in " gross, would be extinguished thereby." (See *Edwards* v. *Slater*, stated in 16 *Vin.* 495. *pl.* 8.) " And a limitation or grant of " new powers would be void against the sons and the heirs male " of their bodies. To prevent this question being made, *A.*, the " tenant for life, conveys an estate to the intended tenant to the " *præcipe*, only during his (the tenant's) and the grantor or bar- " gainor's joint lives. This continues the old reversion in the " grantor or bargainor, and preserves the powers relating to the " original estate. It is customary in these cases to declare, that " the recovery shall enure in the first place for corroborating, " strengthening, and confirming the estate for life of the grantor " or bargainor, and all other estates precedent to the estate in " tail meant to be destroyed, and all powers and privileges annex- " ed to such estate for life, and other precedent estates."

5. As to the effect of a feoffment to make a tenant to the *præcipe*, by passing a freehold by disseisin, see *Taylor* v. *Horde*, and *Butl.* note on that case, both stated in Suppl. tit. *Disseisin, ante.*

(X) Tenant to the *præcipe*. Pleadings. And in what Caſes a good Tenant ſhall be intended. 18 Vin. 216.

1. IN an ejectment upon a trial at bar, for lands held in ancient demeſne, a recovery in the court of ancient demeſne was produced, which had been ſuffered a long time before, and the poſſeſſion had gone accordingly. It appeared, that part of the land was leaſed for life, and the recovery was by the perſon in reverſion; ſo that there was no tenant to the *præcipe*. But the court ſaid, that, as the poſſeſſion had gone with the recovery for ſo long a time, they would preſume a ſurrender; as in an appropriation of great antiquity, a licence has been preſumed, although none appeared. *Green* v. *Froud*, 3 *Keb.* 310. 1 *Mod.* 117. 1 *Vent.* 257.

2. Upon a trial at bar, the leſſor of the plaintiff claimed under an old entail in a family ſettlement, and part of the eſtate appeared to be in jointure to a widow at the time her ſon ſuffered a common recovery. The defendant, who claimed title under the recovery, not being able to ſhew a ſurrender of the mother's life eſtate, it was inſiſted, that there was no tenant to the *præcipe*, as to that part; ſo that the remainder, which the leſſor of the plaintiff claimed, was not barred. To obviate this objection, it was inſiſted by the defendant, that, after ſo long a time had elapſed, a ſurrender ſhould be preſumed, according to the doctrine laid down in the before-ſtated caſe of *Green* v. *Froud*; and, to fortify this preſumption, they offered to adduce in evidence the debt book of Mr. *Edwards*, an attorney at *Briſtol*, then a long time dead, wherein he had charged 32*l.* for ſuffering the recovery; two articles of which charges were, for drawing a ſurrender of the mother's eſtate 20*s.*, and that it appeared by the book that the bill had been paid. This being objected to as improper evidence, the court were of opinion that it ſhould be allowed; for it was a circumſtance material upon the inquiry into the unreaſonableneſs of preſuming a ſurrender of the widow's life eſtate, and could not be ſuſpected of having been done for this purpoſe. If *Edwards* had been living, he might undoubtedly have been examined; and, after his death, this was the next beſt evidence, and it was accordingly read; after which the court declared, *that without this circumſtance they would have preſumed a ſurrender, and deſired it might be taken notice of, that they did not require any evidence to fortify the preſumption after ſuch a length of time.* *Warren, ex dem. Webb*, v. *Grenville*, 2 *Stra.* 1129.

3. *A. B.* being tenant in tail of conſiderable eſtates in *R.*, whereof he was in poſſeſſion of ſome part, the remaining part being held by a widow, on whom it had been ſettled for life, for her jointure, and who was then in poſſeſſion of it, ſuffered a common recovery of the whole ſettled eſtate tail, uſing ſuch general deſcriptions as were ſufficient to include all the eſtate; and then

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ſettled it on *C. D.* Upon the death of *A. B.* the ſaid *C. D.* entered into poſſeſſion of all the eſtate, except the part of which the widow was in poſſeſſion, and upon her death, he took poſſeſſion of that part alſo. An ejectment was brought againſt *C. D.* by the reverſioner for that part of the eſtate tail whereof the widow was in poſſeſſion, at the time when the recovery was ſuffered; upon the ground that there was no ſurrender of the widow's life eſtate. *C. D.* being unable to give any ſort of evidence of an *actual ſurrender*, his counſel inſiſted at the trial, that a ſurrender of the widow's life eſtate ought to be *preſumed* after ſo long a time; even though they ſhould not give any evidence whatſoever of ſuch a ſurrender; but Mr. Juſtice *Noel*, who tried the cauſe, was of opinion, that a ſurrender of the tenant for life could not be preſumed, when no ſort of evidence had been given to make ſuch a fact in the leaſt probable; and when the poſſeſſion had not gone with the recovery, but had continued in the tenant for life until the time of bringing the ejectment; and accordingly he directed the jury to find for the plaintiff. Upon this direction a motion was made for a new trial. The defendant's counſel relied on the before ſtated caſes of *Green* v. *Froud*, and *Warren ex dem. Webb* v. *Grenville*. Lord *Mansfield*—"I was counſel in the caſe of Mr. "*Grenville*, reported by *Strange*, and I remember very well that "the point of evidence was ſtrongly litigated; the attorney who "had been concerned in the tranſaction of the common recovery, "was one *Edwards* of *Briſtol*, who had been then long dead: the "entry in his bill book was made at the time of the tranſaction, "and a receipt had been given upon the bill, which contained "the articles *for drawing and engroſſing the ſurrender*; ſo that "there was poſitive proof in that caſe of an actual ſurrender: "and there the jointreſs had been dead *a vaſt number of years*, "and the perſon who ſuffered the recovery, and his ſon after "him, had both of them, during their reſpective lives, ſufficient "opportunity to have ſet it right after they came into poſſeſſion, "if they had known or ſuſpected it to have been defective, which "certainly formed a preſumption that it was regular, and not "defective. I am confident that all the court did, or intended "to do in that caſe, was only to take care that it ſhould be un-"derſtood, that they did not mean to ſhake the authority of any "one caſe which had been founded upon preſumption, and that "they would not require poſitive proof of a ſurrender, in any "caſe, where there was ſufficient preſumption of it. Sir *J. Strange*'s report is incorrect, conſidered as a foundation for a "principle or rule of property, though it might be enough to "ſerve the taker of ſuch a note for a memorandum to refreſh his "own recollection; if that be ſo, then conſider the preſent caſe "upon principles. Where a man has power to ſuffer a recovery, "that is a ſolid and reaſonable ground for preſuming that all was "done rightly and regularly, unleſs ſomething to the contrary "ſhall appear. And where the freeholder is a truſtee for the "tenant in tail himſelf, and under his power and direction, it is "a rea-

" a reaſonable and juſt cauſe for preſuming, that every thing was " regularly tranſacted; ſo, where the perſon or perſons intereſted " to object againſt the validity of a recovery have had an op- " portunity to make objections to it; but inſtead of doing ſo, " have acquieſced under it, and not diſputed its validity, this " forms a preſumption that all was right and regular. But there " can be no preſumption in the nature of evidence, in any caſe, " without ſomething from whence to make it, ſome ground to " found the preſumption upon; whereas here is abſolutely " nothing from whence to preſume a ſurrender: the ſingle pre- " tence to any the leaſt ground of preſumption, in the preſent " caſe, can only be this, that no tenant in tail in remainder would " ſuffer a recovery, without firſt getting a ſurrender of the life " eſtate, in order to make it valid and effectual. But even that " ground, ſlight as it is, will not hold in the preſent caſe; for it " does not at all appear, upon the report of the judge, that *A. B.*, " who ſuffered the recovery in queſtion, had the leaſt intention " whatſoever to include thoſe particular lands, in the recovery " which he ſuffered, and which he had full power in himſelf " alone to ſuffer, of all the reſt of the eſtate whereof he was at " that time tenant in tail in poſſeſſion. He was then in poſſeſſion " of the manor of *K.* and of other lands in *K.* ſufficient to anſwer " the general deſcriptions uſed in the recovery; he muſt pro- " bably know, or have been informed by his counſel or agents, " that he had no ſuch power over the ſettled parts, without ob- " taining a ſurrender of the life eſtate; he might perhaps be ſa- " tisfied that he could not obtain a ſurrender of the eſtate, or he " might have attempted to obtain it, and failed. If the mere " fact of a remainder-man in tail's ſuffering a recovery was *alone* " ſufficient to ground a preſumption of a ſurrender of the life " eſtate; it would be in the power of every remainder-man in " tail to bar the eſtate tail, notwithſtanding the tenant for life " ſhould abſolutely refuſe to join with him in ſuffering a reco- " very; it is therefore neceſſary, that there ſhould be facts and " circumſtances to ground a preſumption of ſuch a ſurrender " upon: whereas, in the preſent caſe, it is ſo far from being rea- " ſonable to preſume that there was ſuch a ſurrender from the " jointreſs, that there are, on the contrary, many reaſons to in- " duce a ſuſpicion that there was not ſuch a ſurrender; ſhe " might have more regard for the reverſioner than for *A. B.*; " ſhe might think it wrong or unkind to hurt him, or even whim " and peeviſhneſs might prevent her from interfering: there is " no defining the various reaſons ſhe might have to hinder her " from ſurrendering her life eſtate for ſuch purpoſe."—His Lord- ſhip afterwards further added, that he would have it underſtood, that the poſſeſſion of the tenant in tail, after the death of the tenant for life, does leave a ground of preſumption, " that there " was a ſurrender." But, in the preſent caſe, there was no poſ- ſeſſion after the death of the tenant for life: the ejectment was brought immediately. Rule diſcharged *per tot. cur.* *Goodtitle* v. *Chandos*, 2 *Burr.* 1065.

28 Vin. 228. (Y) Tenant to the *præcipe*. Not good; yet the Recovery good.

IN ejectment, the jury found a ſpecial verdict, that *S. W.*, being tenant in tail, conveyed the eſtate by leaſe and releaſe, dated the 19th and 20th of *November* 1788, to a perſon, to make him tenant to the *præcipe*, in order that a common recovery might be ſuffered, which was accordingly ſuffered, and a writ of ſeiſin awarded, teſted the 6th of the ſame month of *November*, returnable in 15 days of *St. Martin*, to which the ſheriff returned, that he, by virtue of the ſaid writ, on the 10th of *November* in the ſame term, did cauſe full ſeiſin of the premiſes therein mentioned to be delivered to the demandant. It was contended, that this recovery was void, for it appeared upon the record, that ſeiſin was delivered by the ſheriff ten days before the date of the conveyance to the tenant of the freehold; when, in fact, *S. W.* was in poſſeſſion of the lands; and that this caſe was not within the ſtatute 14 *G.* 2. *c.* 20. *ſ.* 5. (ſtated in the ſection to which this is a ſupplement,) which aroſe from the fictitious relation to the firſt day of the term, and was made for a different purpoſe, *viz.* to prevent recoveries being ſet aſide, where the tenant to the *præcipe* was created by deed executed after the award of the writ of ſeiſin. The words of the 6th ſection of the act were, "executed after the time of "the judgment given, and the award of the writ of ſeiſin." But there was a material difference between the *award* and the *execution* of the writ, and the 7th and 8th ſections expreſsly provide, that the act ſhould not be extended beyond its ſtrict limits. The counſel on the other ſide were ſtopped by the court, who ſaid, that, though there might have been ſome doubts if it had been found a fact, that ſeiſin was actually given on the 10th of *November*, yet the day named in the return was immaterial; for it was not neceſſary to name any particular day, and the return would have been good without it. All that was neceſſary was, that ſeiſin ſhould be delivered after the judgment, and before the return of the writ; and that the proceedings ſhould all be in the ſame term. That thoſe requiſites were complied with in the preſent caſe, which was directly within the ſtatute 14 *G.* 2. *ſ.* 5 & 6. As therefore the day mentioned in the ſheriff's return was repugnant to the reſt of the proceedings, it was to be rejected; and there muſt be judgment for the defendant. A writ of error was brought upon this judgment in *B. R.* Lord *Kenyon* obſerved, that the ſenſe of the clauſe in the ſtatute 14 *G.* 2. was, that the recovery ſhould be valid, provided the deed making a tenant to the *præcipe* was executed before the end of the term in which the recovery was ſuffered; and it appeared upon this verdict, that the deeds making the tenant to the *præcipe* were executed within the term. And though the ſtatute, in enumerating ſome of the defects for which a remedy was to be applied, does not mention this particular defect, it has al-

ways been underſtood, that the act was intended to remedy every defect of this kind, provided that which is there made a condition be complied with, namely, the making of the tenant to the *præcipe* before the end of the term in which the recovery is ſuffered; nor could the words of the ſtatute be ſatisfied by any other conſtruction. The other judges concurred in opinion with the Lord Chief Juſtice; and the judgment was affirmed. *Goodright* v. *Rigby*, 2 *H. Black.* 46.

(Y. 2) Of the Writ of Seiſin, and Execution thereof. (Suppl. Sect.)

1. IN ejectment the jury found a ſpecial verdict, that *Henry* the 7th granted the manor of *W.* to *T.* Earl of *Derby*, and the heirs male of his body; that *T.* Earl of *Derby*, grandſon to the ſaid *T.*, ſuffered a recovery of the ſaid manor, and afterwards entered into the ſaid manor, and was ſeiſed thereof; but no writ of execution, or entry of the recoveror's appeared upon the ſpecial verdict; and the court of *B. R.* was of opinion, that, as execution was not found, it could not be preſumed, and therefore that the recovery was not good. A writ of error was brought in the Houſe of Lords; and it was argued, that a writ of execution, though not expreſsly found, ought to have been preſumed, for the following reaſons: firſt, from the exemplification of the recovery itſelf, as found; its antiquity of above 230 years; its being entered upon the rolls; the dignity and quality of the parties to it, and a freſh entry of Earl *T.* expreſsly found to have been made after ſuch recovery: ſecondly, from the impoſſibility of any other proof of actual execution, as it was well known, that, amongſt the rolls of the recoveries of that and the preceding reigns, the award of the writ of execution is not entered or indorſed upon one in twenty of them, as has been uſual of late years; and, upon ſearch in the proper offices where the writs of execution of recoveries ſuffered in thoſe early times ought to be filed, not one of ſuch ancient writs is to be met with: thirdly, becauſe, had any objection been made at the time of the trial of the recovery, on this account, the court would, and ought to have directed the jury to find the execution of it, from the exemplification itſelf, and the poſſeſſion of the defendant and his anceſtors agreeable to it; and if ſo, it is difficult to give a reaſon, why the courts of law ſhould not draw the ſame legal concluſions, and make the like legal implication from facts themſelves, which they would direct a jury upon their oaths to do. On the other ſide it was contended, that the judgment of *B. R.* ſhould be affirmed; becauſe it did not appear, that any writ of ſeiſin was ever awarded upon the common recovery, or that the ſame was ever carried into execution by writ of ſeiſin, or otherwiſe; for, until a writ of ſeiſin is awarded, executed, and returned, (all which muſt appear upon record, and cannot be preſumed) it is not a perfect recovery. The following queſtions

were then propoſed to the judges: firſt, "Whether ſufficient "matter was found in the ſpecial verdict, whereupon the common "recovery of 5 *Hen.* 8. could be adjudged a valid common reco-"very?" And ſecondly, if not, "Whether, by law, *a venire fa-"cias de novo* ought to be awarded in this caſe?" And the judges being unanimous in their opinion, that there was not ſufficient found in the ſpecial verdict; and that a *venire facias de novo* ought to be awarded, the judgment of *B. R.* was affirmed. *Witham* v. *Lewis*, 1 *Wilſ.* 48. 4 *Bro. Par. Ca.* 504. S. C.

2. But, in a modern caſe, Lord *Kenyon* ſays of this determination, "Lord *Derby*'s caſe has always been conſidered as a ſtrange "caſe; and the judges of ſucceeding times have been aſtoniſhed, "that no application was made to the court of Common Pleas to "rectify the defect in that recovery, according to the uſual prac-"tice of the court." 5 *Durnf. & Eaſt*, 179.

(Y. 3) Amendment of Common Recoveries. (Suppl. Tit.)

See Suppl. tit. *Fine*, (B. b. 2) *ante*.

Sect. I. In the Names of the Parties.

1. A Common recovery was agreed to be ſuffered, wherein *John C.* and *Richard E.* were to be demandants; and by the miſtake of a clerk, the writ of entry was ſued out in the names of *John C.* and *John E.*: the recovery was allowed to be amended. *Chapman* v. *Bacon*, *Pigott*, 170.

2. A warrant of attorney was given in order to ſuffer a common recovery, by *William R.* and *Heſter* his wife. The ſerjeant who took the warrant of attorney, certified the ſame to be given by *William R.* and *Margaret* his wife, and the *mittimus* and tranſcript were made of a warrant given by *Margaret*, and the recovery was entered accordingly, but it was allowed to be amended. *Pigott*, 170.

3. A common recovery was ſuffered by *R.* and *Ux.*, without mentioning the name of the wife; and it was allowed to be amended. *Thurban* v. *Pantry*, *Pigott*, 171.

4. A recovery was allowed to be amended, by changing the words *Ann* the wife of *Henry G.* to *Elizabeth*, in conformity to a fine and deed to lead the uſes. *Mayre* v. *Coulthard*, 2 *Black.* 1230.

5. A rule was made abſolute to amend a recovery, by tranſpoſing the names of the demandant and tenant, purſuant to the deed making a tenant to the *præcipe*, by the recovery. *Biſcoe* had been demandant and *Lord* tenant; by the deed, *Lord* was to be demandant, and *Biſcoe* tenant. *Lord and Biſcoe*, *Barnes*, 24.

Sect.

Sect. II. In the Deſcription of the Parcels.

1. A common recovery was agreed to be ſuffered of lands in *Alphampton* and *Magna Hermney*, in the county of *Eſſex*; but by miſtake the ſame was ſuffered of lands in *Alphampton* and *Lomarſh*, and it was ordered to be amended. *Skinner* v. *Land*, *Pigott*, 171.

2. A common recovery was agreed to be ſuffered of lands in *New Church*, *Levington*, and *Merſham*; but *New Church* was totally omitted. Upon examining the deed to lead the uſes, it was ordered to be amended. *Whitwell* v. *Maſters*, *Pigott*, 172.

3. A common recovery was agreed to be ſuffered of *two* meſſuages and one garden in *London*; but being only ſuffered of one meſſuage, it was allowed to be amended. *Brooke* v. *Biddulph*, *Pigott*, 172.

4. The *præcipe* and writ of entry in a common recovery were allowed to be amended, by adding the names of ſeveral pariſhes which had been omitted. *Jenkinſon* v. *Staples*, *Pract. Reg.* C. B.

5. The deed to lead the uſes of a recovery mentioned "all "the vouchee's lands in *Aldenham*, or elſewhere, in the county "of *Kent*, in the occupation of *R. G.*" *R. G.* rented one entire farm of the vouchee, (all ſworn to be intended to paſs by the recovery,) being principally in the pariſh of *Aldenham*, but part thereof lay in the pariſh of *Merſham*, which was not known to the parties when the recovery was ſuffered. The court, after taking a day to conſider of it, allowed the recovery to be amended by inſerting the word *Merſham*. *Henzell* v. *Lodge*, 2 *Black. Rep.* 747. 3 *Wilſ. Rep.* 154.

6. On a motion to amend a recovery of lands, *&c.* in the town of *Kingston-on-Hull*, by inſerting the words "*in Myton*," and the words "*and county*," thereby making the deſcription of the lands to be "*in Myton*, in the town and county of *Kingston-upon-Hull*." The deed to lead the uſes deſcribed the parcels to be ſituate "in "the lordſhip of *Myton*, in the county of *York*, or in the town "and county of *Hull*, lately purchaſed of *Thomas Yates*." And it was proved by affidavit, that one *William Crowle* purchaſed of *Thomas Yates* the land intended to paſs, being in the townſhip of *Myton*, in the town and county of *Kingston-on-Hull*, and in 1728 ſettled them ſucceſſively on *George* and *Richard Crowle* in tail; that *George* died without iſſue, and *Richard* being then tenant in tail, and having no other lands in *Kingston-on-Hull*, did in 1754 ſuffer this recovery. The court directed notice to be given to the tenant; and, on his conſenting, made the rule abſolute. *Watſon* v. *Cox*, 2 *Black.* 1065.

7. A recovery, which had been ſuffered nine years before, was ordered to be amended, by putting the word *Trul*, the name of a vill, into its proper place, according to the deed of uſes. *Trul* had been by miſtake put into the recovery as an advowſon, not as a vill, where land lay. It was objected againſt this amendment, 1ſt, that the eſtate was in truſtees at the time of the recovery, and

conſequently, the truſtees not being parties, there was no good tenant to the *præcipe:* 2dly, that the lands were cuſtomary tenure: 3dly, that the parties who ſuffered the recovery were volunteers: 4thly, that the wife of *Pullen*, the vouchee, was dead, and a recovery could not then be ſuffered to bar the remainders. The court ſaid, they would not enter into the queſtion, whether in equity recoveries of truſt eſtates would bar legal remainders, or into the other objections. When the recovery was amended, *valeat quantum valere poteſt*, the intention of the parties was the foundation for the amendment. The tranſaction appeared to be fair, and without fraud or colluſion. The principle upon which they went, was the ſtatute 8 *Hen.* 6. to amend the miſpriſion of the clerk. A *præcipe* was the curſitor's inſtruction for an original writ. A deed of uſes was the clerk's inſtruction for a recovery. The *præcipe* and deed were the things to amend by; and Mrs. *Pullen* being dead, an amendment was the only remedy left; and decreed accordingly. *Coggin and Pullen, Barnes*, 21.

8. In a recovery, a farm called *Thieſside*, otherwiſe *Thieviſhead*, was deſcribed to be ſituate in the foreſt of *Inglewood*, in the pariſh of *Heſkit in the Foreſt*, and *St. Mary's, Carliſle*, or one of them, in the county of *Cumberland*. It was afterwards diſcovered, that the whole of the ſaid farm was not within the pariſhes of *Heſkit in the Foreſt*, and *St. Mary's, Carliſle*, as deſcribed in the recovery; but that part of it was in the pariſh of *Laxonley*, in the county of *Cumberland*. It was moved to amend the recovery, by inſerting the words "the pariſh of *Laxonley*" on the affidavit of the owner of the lands, the vouchee, ſtating as above, and that he meant to include all his eſtates in the county of *Cumberland* in the recovery; and that he did not know, when he ſuffered the recovery, that any part of the ſaid farm was in the pariſh of *Laxonley*. The court would not, on this affidavit alone, grant leave to amend; but, upon reading the deed to lead the uſes, there was found the following clauſe: "and all other the eſtates, manors, or lordſhips, "meſſuages, lands, tenements, and hereditaments whatſoever, "ſituate, lying and being in the county of *Cumberland*." This was holden by the court ſufficient to warrant an amendment; as it appeared on the face of the deed itſelf, and the rule for amendment was made abſolute. *H. Black. Rep.* 72.

9. Where a motion, however, was made to amend a recovery, by ſtriking out "the city of *Lichfield*," and inſerting "the "county of *Stafford*," with other conſequential amendments, whereſoever the names of the county and ſheriff occurred, and alſo by inſerting *Longden*, (the name of a vill,) after *Abnall*, another vill named in the recovery; the court obſerved, that it was a groſs miſtake in the attorney concerned in ſuing out only one recovery inſtead of two, and that they would willingly give the parties all the aſſiſtance they legally could to effect their evident intent; but it was beyond their power. In the caſes of amendments which had been cited, the party had no eſtate in the vill, or county, ſtruck out; therefore, *quoad hoc*, the recovery had

no operation; but the preſent application was, to annul a valid recovery in the city of *Lichfield*, which had operated upon lands therein for near forty years, and to ſubſtitute in its ſtead a recovery in the county of *Stafford*. The motion was refuſed. *Aſton v. Baldwin*, 2 *Black. Rep.* 874.

Sect. III. In the Proceedings.

1. There are two inſtances where, upon motion to amend a recovery, by ſtriking out the words *it is adjudged*, and inſerting the words *it is conſidered*, the court have ordered it to be done; as ſuch an amendment related to the act of the court in giving judgment. *Barnes*, 20. 22.

2. Where a writ of ſeiſin was rightly directed to the ſheriffs of the city of *York*, but not returned in the name of any ſheriff, though a miſtaken return in the ſingular, inſtead of the plural number was indorſed on the writ, the prayer of ſeiſin and return of the writ were ordered to be firſt amended, and then the roll and exemplification accordingly. *Wilton and Fairfax*, *Barnes* 23. *Watſon and Lockley*, 2 *Wilſ.* 2.

3. But in the caſe of *Wynne and Wynne*, ſtated in (P) *ante*, an application was made to the court of Common Pleas, to amend the *teſte* and return of the writ of entry; and a rule to ſhew cauſe—the court, after hearing counſel on both ſides, and conſideration, was of opinion, that all amendments muſt be conſiſtent with the rules of law, and there muſt be ſomething to amend by. In this caſe the vouchees by law could not appear until the return day of the writ of ſummons, and the power of attorney given by *G.* to appear on that day was revoked by her death in the intermediate time. By the ſtatute 8 *Hen.* 6. original writs are amendable, if wrong by miſpriſion of the clerk, or where there is any thing to amend by. Here was no miſpriſion of the clerk, the writ was made agreeable to his inſtructions, and there was nothing to amend by; the amendment prayed is to amend in the firſt inſtance. The rule was diſcharged. *Barnes*, 17.

(Z) The *King* bound, in what Caſes, by Fine or Recovery. 18 Vin. 230.

IT was found by ſpecial verdict, that *A. B.* being tenant in fee, enfeoffed *Henry* Earl of *Derby*, afterwards king *Henry* 4. to hold to him and his heirs. Afterwards the king, by letters patent under the duchy ſeal of *Lancaſter*, 7 *Hen.* 4. reciting the ſaid feoffment, and that *M.* the wife of *D.* was grand-daughter and heir of *A. B.*, and that *D.* and his wife had petitioned the king to be fully re-enfeoffed thereof; *nous voulantz cele partie ſoit fait, ceo que loy, bone foy, & conſcience demandent*, have, of our ſpecial grace, given and granted to the ſaid *D.* and *M.* his wife, and the heirs of the body of the ſaid *M.* the ſaid premiſes, to be holden as of

the king and his heirs, dukes of *Lancaſter*, as to the duchy of *Lancaſter* in chief for ever; with reverſion to the king and his heirs, dukes of *Lancaſter*, on failure of iſſue of the ſaid *M.* The queſtion was, Whether the intail created by the letters patent of *Hen.* 4. with the reverſion to the king in fee, was, under all its circumſtances, ſuch an eſtate tail as was protected from being barred by a common recovery, by virtue of the ſtatute 34 *Hen.* 8. *c.* 20. Lord *Mansfield*—"It is certain that the preamble of the "ſtatute cannot reſtrain the enacting part of it, where the enacting part of it is clearly larger than the preamble. But, in this "caſe, the eſtates mentioned in the enacting part, clearly refer "to thoſe in the preamble, by the word *ſuch*, which runs through "the whole. It muſt therefore be admitted, that, in order to "obtain the protection of the ſtatute of *Hen.* 8. the eſtate tail "muſt be of the *gift* or *proviſion* of the king, by way of reward. "As for the ſervices, which are the conſideration of ſuch gift, "theſe muſt, at ſuch a diſtance of time, be preſumed, and need not "be proved. To take it out of the ſtatute, you muſt ſhew, that "it is not of the gift or proviſion of the king. And, in the preſent caſe, it is plainly not ſo, upon the face of it. The petition "is founded upon no other conſideration, than that *M.* was "couſin and heir of *A. B.*, who enfeoffed the Earl of *Derby*. No "merits are mentioned, notwithſtanding the ſtatute 4 *Hen.* 4. "*c.* 4. was then recent. The king himſelf ſtates, that he was "bound to make the grant by *law*, *good faith*, and *conſcience*. "What the circumſtances of the fact were, cannot now be diſcovered: whether a defeazance, a condition, or an uſe, or any "thing elſe. Nor is it material to know. It is enough, that "the king has recited generally, that he was *bound* to do it. It "cannot therefore be a *gift*. As to the objection, which was "made on the part of the defendant, that the king granted only "a particular eſtate, and kept back the fee, that might be all he "was bound to do. Nor can we reaſon very concluſively from "the conduct of ſuch a prince as *Henry* the fourth; he might "poſſibly do only half juſtice. Such things have happened in "latter times. Lord *Angleſey*, after the reſtoration, was obliged "to reſtore the eſtates he had got during the rebellion in *Ireland*; "yet many of the poor owners were glad to compound, and take "leaſes for 99 years, inſtead of the fee. Upon the whole, as the "eſtate was not of the king's gift, I think it not within the protection of the ſtatute, and therefore the recovery is good." Mr. Juſtice *Yates* was of the ſame opinion, and ſaid, the court would not ſtretch to enlarge the interpretation of a ſtatute, which prohibits the natural right of alienation by tenant in tail. *Perkins* v. *Sewell*, 1 *Black.* 654. 4 *Burr.* 2223. S. C.

(A. a) Reverſed, falſified, or ſtayed. For what, when, and how. 18 Vin. 235.

1. IN the caſe of *Wynne* v. *Wynne* (ſtated in (P) *ante*), one of the queſtions was, Whether the plaintiff in error was not eſtopped to aſſign the death of the vouchee to have happened on the 10th of *May*, which was before judgment, when it appeared upon the face of the record, that ſhe appeared by attorney on the return day of the writ of ſummons, which was the 16th day of *May*. And the court were clearly of opinion, that the death of the vouchee before judgment was not contrary, but a matter collateral to the record, and properly aſſignable for error, and triable by jury; for, all the record ſaid was, that the vouchee appeared by her attorney; it did not ſay any thing of her actual exiſtence at the time, but put a matter in iſſue which was properly triable by the country.

2. On error brought in *B. R.* to reverſe a common recovery, Lord *Manſfield* ſaid, that, by the eſtabliſhed mode of proceeding, there muſt be a *ſcire facias* againſt the terretenant, otherwiſe it is an irregularity, *but no more*; ſince he is not concerned in intereſt; and therefore a terretenant, who came in upon a *ſci. fa.* in this caſe, and pleaded *non-tenure*, was ordered to anſwer over. *Hall* v. *Woodcock*, 1 *Burr.* 359.

3. A writ of error was brought 19 *Geo.* 2. to reverſe a common recovery which was ſuffered in 5 *Ann.* The defendant pleaded this ſtatute in bar, the writ of error not having been brought within 20 years after the recovery was ſuffered, to which it was anſwered, that the plaintiff's title did not accrue until the death of one of the vouchees without iſſue in the year 1739. After ſeveral arguments, the court determined that the writ of error did not lie, becauſe the ſtatute 10 & 11 *W.* 3. (ſtated in the ſect. to which this is a ſupplement) was made to quiet poſſeſſions, and to fix a certain period beyond which fines and recoveries ſhould not be impeached, for the words of the ſtatute expreſs "twenty years "after ſuch fine levied or recovery ſuffered." And it has not the words which are in the ſtatute of fines, *viz.* after the title accrued. The *terminus a quo* is the time when the recovery is ſuffered, and if that were once exceeded, there would be no knowing where to ſtop; a reverſioner after an eſtate tail, which had ſubſiſted above a century, might, upon this principle, be allowed to reverſe a common recovery, whereas perſons in reverſion were never the objects of the legiſlature's care. It was ſufficient, that they had a chance of the reverſion's veſting within the 20 years, in which caſe they might bring a writ of error, but not afterwards. *Lloyd* v. *Vaughan*, 2 *Stra.* 1257.

4. In the caſe of Sir *Butler Wentworth*, *in ejectment*, which was tried at the bar of *C. B.* in *Mich.* term 1744, evidence of weakneſs of underſtanding was admitted to invalidate the deed, by

which a tenant to the *præcipe* was made for the purpoſe of ſuffering a common recovery, and the effect of the recovery was *by that means* defeated. 1 *Veſ.* 403. 3 *Atk.* 313.

5. So in the caſe of *Jones, ex dem. Hale*, v. *Cave*, in ejectment, tried at *Hereford* at the *Lent* aſſizes 1765, by Sir *John Eardley Wilmot*, evidence was admitted to prove the weakneſs of underſtanding of the vouchee in a common recovery, who appeared by attorney, and the recovery was by that means invalidated. A motion was made the next term for a new trial, on account of miſdirection of the judge, and it was contended that ſuch evidence ought not to have been admitted; but the motion was refuſed. *Cruiſe on Com. Rec.* 3d edit. 355.

6. The caſes of *Goodtitle* v. *Chandos*, ſtated in (X) *ſupra*, and *Taylor* v. *Horde*, ſtated in Suppl. tit. *Diſcontinuance*, *ante*, are alſo inſtances in which recoveries have been falſified in ejectment.

7. With reſpect to the effect of judicial proceedings, as *concluſive* evidence, in an attempt to impeach the ſanity of a tenant in tail, vouchee in a common recovery, ſee *Hume* v. *Burton*, ſtated in Suppl. tit. *Evidence*, *ante*.

18 Vin. 238. (B. a) Error to reverſe a Common Recovery. By whom it may be brought.

1. THE grantee of a rent charge for years may falſify a recovery againſt the terretenant. *Hal. MS. Harg.* note 4. *Co. Litt.* 46. *a.*

2. In the caſe of *Sheepſhanks* v. *Lucas*, ſtated in (P) *ante*, an objection was made to the writ of error, becauſe the plaintiff did not ſhew how his title aroſe. But the court ſaid, that a complete title need not be ſet forth in a writ of error; it was only required of the plaintiff in error, to ſhew the connection and privity between the perſon againſt whom the recovery was had, and the perſon who brings the writ of error; for it was not like a proceeding to try the right of land, or to recover the land itſelf.

For more of *Com. Recoveries*, ſee 22 *Vin.* 214. (O. 5) *Uſes*.

Refunding.

(A) By what Perſons.

28 Vin. 273.

1. WHERE a legacy is given to an executor generally, or for his care and pains, it makes no difference; for, if there be a deficiency of aſſets, he muſt abate in proportion with other legatees. 2 *Atk.* 171. 1741. *Anon.*

2. The court will not ſtrain to prefer one legatee to another; but where there is a deficiency of aſſets will let the general rule of equality take place. 3 *Atk.* 99. 1744. *Clark* v. *Sewell.*

3. A deviſee of an annuity for life charged on the perſonal eſtate, where there is a deficiency of aſſets, ſhall abate in proportion. 3 *Atk.* 693. 1749. *Hume* v. *Edwards.*

4. A legatee, paid voluntarily by the executor is not obliged to refund to the reſt, unleſs the executor become inſolvent. 2 *Veſ.* 194. 1750. *Orr* v. *Kaines.*

5. Pecuniary legatees abate in proportion, notwithſtanding a direction in the firſt place, or time of payment mentioned: but it may be otherwiſe on a ſtrong intent, or if it is a purchaſe of dower, and the wife is entitled to her dower. 2 *Veſ.* 420. 1752. *Blower* v. *Korrett.*

6. Lord *Hardwicke*, Chancellor, doubted how far reſiduary legatees, whoſe legacies were to remain in the hands of the executors, and not to be paid immediately, could be called upon to pay back money which they had received as the ſurplus from the executors on account of the perſonal eſtate, and where there was no proof of fraud. 2 *Veſ.* 600. *June* 1755. *Moore* v. *Moore.*

7. A legacy and an annuity were given to a wife in lieu of dower; on deficiency of aſſets ſhe ſhall not abate. *Ambl.* 244. 1754. *Davenhill* v. *Fletcher.*

8. Upon a deficiency of aſſets in this court, a value muſt be ſet upon an annuity at the time of the death, and the annuitant can claim only in reſpect of that. 4 *Veſ. jun.* 763. 1799. *Franks* v. *Cooper.*

9. The teſtator leaves aſſets ſufficient to pay all debts and legacies. The legatees receive payment, which the creditors might alſo have had, if they had demanded it in time. They lie by for eleven years, and the eſtate is waſted; yet the legatees ſhall refund. 1 *Anſtr.* 112. 33 G. 3. *Hardwicke* v. *Mynd.*

18Vin. 273. (B) In what Caſes: and where the Payment was illegal, and not to be countenanced.

MONEY advanced for procuring a commiſſion in the marines. The purchaſer after ſix months, being diſcovered to have worn a livery, was diſcharged. The money was decreed to be refunded with intereſt. *Ambl.* 433. 1763. *Morris* v. *M'Cullock.*

For more of *Refunding* in general, ſee *Deviſe*, *Executors*, and other proper titles.

18Vin. 284.

Rehearing.

1. MUST be applied for within ſix months after pronouncing the decree. *Bunb.* 309. 1731. *Drake* v. *Hopkins.*

2. It is in the diſcretion of the court, whether or not to grant a rehearing. 3 *P. Wms.* 8. 1724. *Mills* v. *Bankes.*

3. An agreement was ſigned by the parties, and by *conſent* made an order of court, to ſubmit to ſuch decree as the court ſhould make, and neither party to bring an appeal; yet the cauſe was allowed to be re-heard. 3 *P. Wms.* 242. 1733. *Buck* v. *Fawcett.*

4. A cauſe on a rehearing muſt be opened as a caſe. 2 *Atk.* 50. 1740. *Anon.*

5. Lord *Hardwicke* C. was of opinion that a defendant making no more than the uſual depoſit on a petition for a rehearing was a great hardſhip on a plaintiff, and not an adequate conſideration. 2 *Atk.* 138. 1740. *Aſtel* v. *Montgomery.*

6. In matters of account, which are intricate, the Houſe of Lords refer it to two merchants named by the parties to conſider the caſe, and report their opinion upon it. 2 *Atk.* 144. 1740. *Gyles* v. *Wilcox.*

7. A decree muſt be made complete againſt a defendant, though he has made default, before you can petition for a rehearing. 2 *Atk.* 152. 1740. *Baxter* v. *Wilſon.*

8. *Query*, Whether an infant can before he comes of age put in a new anſwer, ſo as to hear the cauſe over again. 2 *Atk.* 487. 1742. *Bennett* v. *Lee.*

9. On a rehearing, depoſitions may be read, which were not read on the original hearing. *Ambl.* 90. 1750. *Cunyngham* v. *Cunyngham.*

10. Two

10. Two days notice ſufficient for a rehearing. 1 *Veſ. jun.* 45. 1789. *Robinſon* v. *Taylor.*

11. A new plaintiff by ſupplemental bill may impeach a decree upon rehearing on the petition of former parties. 1 *Veſ. jun.* 405. *Hill* v. *Chapman*, 3 *Bro. Ch. Rep.* 391. S. C.

12. A rehearing is the proper mode of impeaching a decree, not ſigned, and enrolled, for error. 5 *Veſ. jun.* 509. 1800. *Bolger* v. *Mackell.*

13. Appeal to the chancellor of the duchy court of *Lancaſter* from a decree of the vice-chancellor diſmiſſing the bill, affirmed on petition of the plaintiff. 5 *Veſ. jun.* 722. 1801. *Omerod* v. *Hardman.*

14. If a matter be miſtaken at the hearing, it is to be ſet right by rehearing, and not otherwiſe: but if it be a ſmall miſtake, it is ſometimes rectified by petition to the Chancellor, or Maſter of the Rolls, who heard the cauſe; praying that all parties may attend the regiſter with the minutes, and that they may be rectified, which is done, if the court ſees occaſion. 1 *Harr.* 651.

15. If either party intends to rehear the cauſe, the firſt ſtep to be taken is, to enter a *caveat* with the ſecretary of decrees and injunctions; and when the decree comes to be inrolled, the ſecretary muſt ſummon the party upon his *caveat*, and give him notice, that the decree is come to his hands, for the purpoſe of being inrolled by the Lord Chancellor. 1 *Harr.* 648.

For more of *Rehearing* in general, ſee *Review*, and other proper titles.

Releaſe.

(Y. a) Relieved or ſet aſide in Equity.

18 Vin. 370.

1. WHERE a daughter of a freeman of *London* accepts of a legacy of 10,000*l.* left her by her father, who recommended it to her to releaſe her right to her orphanage part, which ſhe does releaſe accordingly: if the orphanage part be much more than her legacy, though ſhe was told ſhe might elect which ſhe pleaſed; yet if ſhe did not know ſhe had a right firſt to inquire into the value of the perſonal eſtate, and the quantum of her orphanage part, before ſhe made her election; this is ſo material, that it may avoid her releaſe. 3 *P. Wms.* 316. 1734. *Puſey* v. *Sir Ed. Deſbouvrie.*

2. It is common in equity to reſtrain a general releaſe to what was under conſideration at the time of giving it. 1 *Veſ.* 507. 1758. *Cole* v. *Gibſon.*

3. Where

3. Where a releaſe is given on a particular conſideration recited, notwithſtanding the releaſe concludes with general words, yet it is conſtrued to relate to the particular matter recited. 2 *Veſ.* 310. 1751. *Ramſden* v. *Hylton.*

4. A releaſe after a general aſſignment is no anſwer to the aſſignee, if notice; and defendant's knowledge, that the aſſignee was on many occaſions a truſtee for the aſſignor may be ſufficient to affect him with notice. 1 *Veſ. jun.* 43. 1789. *Wilkinſon* v. *Stafford.*

5. *A.*, tenant for life, with remainder to *B.* in tail, commits a forfeiture. *B.*, in conſideration of an annuity for the life of *A.*, releaſes. The releaſe is not good againſt the heir of the body of *B.*, and *B.* is therefore bound to make a good conveyance for the life of *A.* 2 *Anſtr.* 579. 35 *G.* 3. *Lewis* v. *Rogers.*

Remainder.

18 Vin. 372. **(A) What ſhall be ſaid a Remainder, and what a Reverſion.**

See Suppl. tit. *Copyhold*, (B. a) and the references from Suppl. tit. *Deſcent*, (I) *ante.*

18 Vin. 390. **(F) Who ſhall have the Remainder.**

THIS ſection is appropriated (after Mr. *Viner*,) for the reception of thoſe caſes which relate to different limitations to baron and feme and their iſſue, and it is diſtributable into *four* heads:

Firſt, Where the limitation is to baron and feme *jointly*, remainder to the heirs of *their bodies*; in which caſe it is an eſtate tail executed in *both* of them, as in the following inſtances:

1. Upon a marriage, the huſband covenanted to ſtand ſeiſed of lands to the uſe of himſelf and his intended wife for their lives, and the life of the longer liver, remainder to the uſe of the *heirs* on *the body of his ſaid intended wife by him lawfully to be begotten*, remainderto the uſe of his own right heirs. The huſband having ſurvived the wife, levied a fine of the lands; and after his deceaſe a queſtion aroſe upon the operation of this fine; which depended on the point, whether the words *to the uſe of the heirs on the body of the wife by the huſband to be begotten*, gave an eſtate tail only to the wife, or a joint eſtate tail to both. And it was decided,

cided, upon the authority of *Goſſage* v. *Taylor*, (ſtated in 10 *Vin.* 273. (C. a) *pl.* 3.) that the limitation gave an eſtate tail to both. *Denn* v. *Gillott*, 2 *Durnf. & Eaſt*, 431.

2. So, in the caſe of a copyhold, where a ſettlement was made by the huſband, previous to marriage, of his freehold eſtates, to the uſe of himſelf and his intended wife for their lives, and the life of the ſurvivor; and after their deceaſe, to the *heirs of the body of the ſettlor* on the body of his intended wife to be begotten, with remainder to his own right heirs; in which he covenanted to ſurrender his *copyhold* (which was of inheritance deſcendible by the cuſtom of the manor to the *youngeſt ſon*,) to the uſe of himſelf and his intended wife, and the *heirs of their two bodies* to be begotten, *in like manner* and to the *ſame uſes*, as the freehold lands and tenements therein before mentioned were ſettled and conveyed. After the marriage he ſurrendered the copyhold to the uſe of himſelf and wife for their lives, and the life of the ſurvivor of them, and after their ſeveral deceaſes, to the uſe of the *heirs of their two bodies*; and for want of ſuch iſſue, to the uſe of himſelf in fee. *De Grey* Chief Juſtice, ſaid, it was a mighty clear caſe. That there was reaſon indeed to ſuppoſe, the parties might not mean the two eſtates to go in a different channel. But that was only ſuppoſition, and *if certain*, ſtill as this was a *legal eſtate*, it was not in the power of the parties to alter the *legal* courſe of deſcent. That it was an eſtate *executed*, and ſeemed to be an eſtate tail in the father and mother. And *Blackſtone* Juſtice, held the freehold clearly veſted in the *father only*, in ſpecial tail, and the copyhold in *both father and mother*; and that the words *in like manner*, only meant that both eſtates ſhould be intailed. *Roe* v. *Aiſtrop*, 2 *Black. Rep.* 1228. See *Moody* v. *Moody*, ſtated in Suppl. tit. *Recovery*, (M) *ante*.

Secondly, Where the limitation of the freehold is not joint, but *ſucceſſive*, as, to one of them, for life, remainder to the other for life, remainder to the heirs of their two bodies; there the ulterior limitation is not executed in *poſſeſſion*, but gives them a joint *remainder* in tail, as,

3. In a caſe ſtated by *Atkyns*, upon a ſurrender of a copyhold to the uſe of the huſband for life, then of the wife for life, and of the heirs of the bodies of the huſband and wife, remainder in fee to the uſe of the ſurvivor: it is ſaid, that the limitation did not veſt an abſolute eſtate tail in the wife who ſurvived, but only gave her an eſtate tail *after poſſibility of iſſue extinct*, and that the eſtate tail veſted in the perſon who was *heir of the bodies* of both huſband and wife. But Mr. *Fearne*, in his *Cont. Rem.* 4th edit. p. 81. obſerves, that the reaſons for this opinion are not mentioned; that indeed it is not ſtated, that it was the reſolution of the court, nor did it appear whether that point entered into the queſtion then before the court; and that he thought it no eaſy matter to account for ſuch an opinion. The limitation to the heirs of the bodies of the *baron* and *feme*, muſt, he continues, either have been executed in the

the *baron* and *feme* jointly as an eſtate tail in *poſſeſſion*, or have veſted in them jointly as a *remainder*; unleſs it could have been held a *contingent* limitation to the heirs of both their bodies. In neither of the two firſt caſes, he adds, could the wife be tenant in tail *after poſſibility of iſſue extinct*, ſo long as any *iſſue of her body by her deceaſed huſband* was living; and if there was any ſuch iſſue then living, it could not veſt in ſuch iſſue till her death. In the third caſe, ſhe could take no *eſtate tail* at all, and conſequently could not be tenant in tail *after poſſibility of iſſue extinct*. The only caſes, he remarks, in which ſhe could be tenant in tail *after poſſibility of iſſue extinct*, were thoſe two, in which it was impoſſible there ſhould *then* be any ſuch perſon as the *heir* of both their bodies. The queſtion being upon a ſurrender of a copyhold, made no difference, he obſerves, in the conſtruction; as it was agreed, in the ſame caſe, that ſurrenders of copyholds ſhould be conſtrued in the ſame manner as conveyances at common law. Now under a ſimilar limitation at common law, he apprehended the huſband and wife taking *diſtinct and ſucceſſive* eſtates for life, the *joint* limitation to the heirs of their bodies would not have been executed in them in *poſſeſſion*, but would have been veſted in them jointly, as a *remainder* in tail; that this remainder ſurviving to the wife upon the deceaſe of her huſband, would have merged her eſtate for life, ſo as to make her tenant in tail in poſſeſſion; but ſhe having had no iſſue by her deceaſed huſband, or ſuch iſſue being then extinct, would thereby have become only tenant in tail *after poſſibility of iſſue extinct*. *Sutton* v. *Stone*, 2 *Atk.* 101.

Thirdly, Where the firſt limitation is to baron and feme *jointly*, and the ſubſequent limitation is to the heirs of the body of *one* of them; there the ſubſequent limitation veſts an eſtate tail in *ſuch one* of them *only*; as in the caſes of *Kirkman* v. *Thompſon* (ſtated in 10 *Vin.* 261. (T. 12) *pl.* 3), and *Murrell* v. *Rumſey*, (ſtated in 22 *Ib.* 398. *pl.* 40.) See alſo *Doe* v. *Hobſon*, 2 *Black.* 695.

Fourthly, Where an eſtate for life is limited either to the baron or the feme *only*, and the ſubſequent limitation is to the heirs of *both* their bodies; there this limitation does not veſt in the anceſtor taking the eſtate for life, but is a *contingent* remainder to the heirs of the bodies of both baron and feme, as where

4. *J. S.*, being ſeiſed in fee of copyhold lands, ſurrendered the ſame *to the uſe of M.* his then intended wife, *and the heirs of their two bodies* lawfully to be begotten, and for default of ſuch iſſue, to the uſe of the right heirs of the ſaid *J. S.* The marriage took effect, and afterwards *M.* was admitted tenant to the lands according to the ſurrender. Upon a trial in ejectment, the queſtion was, what eſtate the wife took under the ſurrender? It was contended for the plaintiff in the cauſe, that this was an eſtate in ſpecial tail executed in *M.* the wife. On the defendant's ſide, it was

was inſiſted, that *M.* only took an eſtate *for life*, with *contingent remainder* to the *heirs of the bodies of the huſband and wife*. And, upon a caſe ſtated for the opinion of *C. B.*, that court, after hearing two arguments, and taking time to conſider, determined in favour of the defendant. *Frogmorton* v. *Whaley*, 3 *Wilſ.* 125. 144. 2 *Black. Rep.* 728. S. C. See *Lane* v. *Pannel* (ſtated in 18 *Vin.* 390. (F) *pl.* 1. and *Ib.* 399. (H) *pl.* 1.) S. P.

See Roe v. Quartley, ſtated in Suppl. tit. *Deviſe*, (U. b.) *ante*, by which is recognized a diſtinction between a limitation to the right heirs of baron and feme, and the right heirs of two other perſons.

(H) What ſhall be a Remainder, attached, and what in Abeyance or Contingency. 18 Vin. 399.

1. MR. *Fearne*, in the 4th edit. of his *Cont. Rem.*, *p.* 99. notices a caſe which occaſionally occurs in practice. It is that of an eſtate limited to one for life by *deed*, and a limitation afterwards, in his lifetime, to his heirs, under an execution of a power of appointment, contained in that deed; as a limitation to the uſe of *A.* for life, and after his deceaſe to ſuch uſes as *B.* ſhall appoint; who afterwards, in *A.*'s life, appoints the uſe to the right heirs of *A.* Upon which the queſtion ariſes, whether the limitations unite, according to the general rule, (which Mr. *Fearne* ſtates in *ibid.* 103.) or the latter operates by way of contingent remainder to the heir. Mr. *Butler*, he adds, in *note* 1. *Co. Litt.* 299. *b.* notices this caſe; and, after ſtating the arguments (ariſing from the uſes limited under the power, equally owing their effect to the original conveyance,) in favour of the union of the two limitations, (to which opinion Mr. *Butler* himſelf inclines,) obſerves, that thoſe arguments are open to ſome objections, particularly with reſpect to the poſition, that both the limitations *are made at the ſame time*. Mr. *Fearne*, after informing us, that he had known a concurrence of opinions, of ſome of the firſt of the profeſſion at the time, in favour of the union of the limitations, under the circumſtances in queſtion, proceeds to obviate theſe objections, by ſhewing, that no identity of time in *declaring* or *veſting*, but only of the inſtrument *creating* or *giving effect* to the two limitations, is requiſite to the operation of the rule.

2. By marriage articles, money was agreed to be laid out in the purchaſe of lands to the uſe of the huſband for life, remainder to truſtees during his life, to preſerve, *&c.*; then to the wife for life; then to all and every child or children to be begotten by the huſband on her body, for ſuch eſtate, *&c.*, proportion, *&c.*, as the huſband and wife during their joint lives, by any writing, *&c.* ſhould appoint; and in default, *&c.*, then as the ſurvivor ſhould appoint; and in default, *&c.*, to be equally divided among the children, if more than one as tenants in common, with croſs remainders; and if but one, then to that child in tail; and in default of ſuch iſſue to the huſband, his heirs and aſſigns for ever. Upon a queſtion, whether the *inheritance* in the lands to be purchaſed

chaſed would have veſted in the father, it was contended it could not; becauſe during his whole life, the inheritance, ſuppoſing a purchaſe made, would have been in *abeyance*; for, as he might have limited it to any child *in fee*, and the proviſion over in default of appointment would then have been out of the queſtion, it was a ſpringing uſe, reſting in ſuſpence during his life; for which Lord *Conway*'s caſe was referred to. But Lord *Hardwicke* held, that the father taking an eſtate for life by the *ſame ſettlement*, the inheritance would have veſted in him. He ſaid, that where no perſon was ſeen or known in whom the inheritance could veſt, it might be in abeyance; that the fee's being in abeyance, had in ſome caſes occaſioned an act of parliament to remedy it; but there it was *not ſo*: nor did the *power of appointment* make any *alteration* therein; for the only effect thereof was, that the fee which *was veſted*, was thereby *ſubject* to be *diveſted*, if *the whole* was appointed: or if part, *ſo much* as was *not drawn out* of the inheritance, ſtill remained in the father as part of the old fee. *Cunningham* v. *Moody*, 1 *Veſ.* 174.

3. By marriage-ſettlement lands were limited to the uſe of the wife and *her heirs* till the marriage, afterwards to her ſeparate uſe for life, remainder to the uſe of her huſband for life, remainder to the uſe of all and every child and children of the marriage, or ſuch of them, for ſuch eſtates and intereſts, *&c.* and in ſuch parts, ſhares, and proportions as the huſband and wife ſhould by deed appoint, and for want, *&c.* then as the ſurvivor of them ſhould by deed or will appoint; and for want of ſuch appointment, then to the *uſe of all and every the child or children* equally, ſhare and ſhare alike, *&c.* Upon a queſtion, whether the remainders to the children were *veſted* or *contingent*; it was contended, that the power of appointment prevented their veſting, by abſorbing the whole fee; and the caſes of *Leonard* v. *Levie*, and *Loddington* v. *Kime*, ſtated in 18 *Vin.* 402. *pl.* 13. and ſide note, were cited in ſupport of this concluſion. Lord *Kenyon*, on the authority of the laſt ſtated caſe, was of opinion, that the remainders to the children were *veſted*, but ſubject to be *diveſted* by the perſons executing the power. *Doe* v. *Martin*, 4 *Durnf. & Eaſt*, 39.

See Fearne's Cont. Rem. 4th edit. 349. where the author, after noticing the two laſt ſtated caſes, reconciles the principles on which they were decided, with thoſe which prevailed in the caſe of Loddington v. Kime above referred to, by diſtinguiſhing between caſes where the limitation of the fee is *originally* and *finally* contained by the conveyance *itſelf*, (as in the latter caſe) and thoſe where its effect is referred to a *ſubſequent* direction or appointment, whether the inſtrument, authoriſing ſuch ſubſequent diſpoſition, reſtricts it to the *whole fee*, or allows the appointor to ſtop at a *leſſer* eſtate. In the firſt caſe, he obſerves, there exiſts an *actual* limitation of the *fee, complete and perfect*, as it ever can be, from the *time* of *executing* the deed; in the other, no limitation at all, however the power may be worded, *actually exiſts*, until the appointment gives it eſſence; and if no ſuch appointment is ever *made*, how can it, he inquires, intercept or ſuſpend the effect of limitations *actually made*, ſo as to render them contingent?

4. *C. F.* ſettled the lands on his ſon *T. F.* for life, retaining the reverſion in himſelf; and afterwards by his will, reciting that he had ſettled the eſtate on his ſon *T. F.* for his life, he, *after his deceaſe*, gave and deviſed the ſame to the *heirs male of his body*, and in default of ſuch iſſue, to the teſtator's own ſecond, and other ſons ſucceſſively

ſucceſſively in tail male. *T. F.* after the teſtator's death, died without iſſue. One of the points contended for was, that the two eſtates, *viz. that* ſettled on *T. F. for his life*, by deed in his father's lifetime, and *that* deviſed to the *heirs male of his body*, by his father's will united, and thereby created an eſtate tail in *T. F.*: as, it was ſaid, never to have been determined, that two eſtates in the ſame land, though by different conveyances, *both voluntary* and both flowing from the *ſame perſon*, ſhould *not* unite. Lord *Manſfield*, in delivering the opinion of the court, ſaid, they all thought, that the eſtate for life being by *one inſtrument*, and the limitation in tail by *another*, they could *not* unite, and that the *heirs male* of *T. F.* would have *taken by purchaſe*. That this was a ſettled point, and they laid it down as their clear opinion. *Doe* v. *Fonereau*, *Dougl.* 470.

5. With reſpect to the dictum of Lord *Wright* in *Cliſton* v. *Jackſon*, (ſtated in 18 *Vin.* 387. *pl.* 13.) ſee *Moore* v. *Packer*, (ſtated in *Ib. pl.* 12.) and upon the caſe of *Pybus* v. *Mitford*, cited by his lordſhip in ſupport of it, note, with Mr. *Fearne*, in his eſſay on *Cont. Rem.* 97. 4th edit. that, though the freehold, in that caſe, was by *implication*, yet that implication aroſe upon and was the effect of the *ſame* deed as that which contained the limitation to the heirs of the body.

(H. 2) What is. Where the veſting of a ſubſequent Remainder depends on the Performance of a Condition, or the happening of a Contingency annexed to a meſne Remainder. 18 Vin. 402.

See the ſeveral ſections relating to "*Eſtates in tail and for life*," under Suppl. tit. *Deviſe*, *ante*. See alſo the whole of (N. c) under the ſame title, in which place is taken up the conſideration of thoſe caſes, wherein a condition annexed to the preceding eſtate, is, or is not conſidered as a condition *precedent*, to give effect to the ulterior limitations, ſo as to render them *contingent*.

(K) At what Time it *muſt* or *may* attach. 18 Vin. 405.

TESTATOR deviſed to his wife for life, remainder to *E.* his ſon for 99 years, if he ſhould ſo long live, and after the deceaſes of the wife, and *E.* his ſon, to the heirs of the body of the ſaid *E.*; but not to deſcend entirely unto *E.*'s eldeſt ſon; but that *E.* might appoint the ſame to all his children living at his death; and in default of appointment, then to his ſons as tenants in common in tail, remainder to his daughters, remainder over. The mother died in the lifetime of *E.* the ſon; and it was held, that the limitation to the iſſue of *E.*, being a contingent remainder, failed by the death of the mother (who had the only preceding

eſtate of freehold) in *E.*'s lifetime, for want of a continuing particular eſtate of freehold to ſupport it. *Doe* v. *Morgan*, 3 *Durnf. & Eaſt*, 763.

18 Vin. 406. (L) Contingent or other Remainder. *Veſts at what Time.*

WHERE a contingent remainder is limited to the *uſe* of ſeveral (but not at common law) who do not all become capable at the ſame time, notwithſtanding it veſts in the perſon firſt becoming capable, yet it ſhall deveſt as to the proportions of the perſons afterwards becoming capable *before* the determination of the preceding eſtate, in the following caſes:

1. One deviſed to his daughter, and her children on her body begotten, or to be begotten by her then huſband, and their heirs for ever. The daughter, at the time of the will, had one child, and others afterwards. It was held, the mother and all the children took *jointly in fee*, it being ſtated, that, at the time of the will, ſhe had a child, which had been conſtrued equal to children, 2 *Vern.* 106.; that *Co. Lit.* 9. was expreſs that to *A. et liberis ſuis* and their heirs was a joint fee to all; and that it was no objection that the ſeveral eſtates might commence at *different times*. *Oates* v. *Jackſon*, 2 *Stra.* 1172.

2. Deviſe to the teſtator's niece for life, remainder to truſtees to preſerve contingent remainders, remainder to all and every of her children, by her then huſband, and their heirs for ever, equally to be divided between or among them; if more than one, ſhare and ſhare alike; if but one, then to that one, his or her heirs for ever. The daughter had no child at the teſtator's death, but afterwards had three by her ſaid huſband, who died in their parents' lifetime. One point contended for was, that the limitation to the children being in fee, was contingent, till the *death of the mother*; and therefore the remainder over took effect, on her leaving no child; but it was held, that the fee veſted in the child firſt born, and afterwards opened, and let in thoſe born at ſubſequent periods. *Doe* v. *Penyn*, 3 *Durnf. & Eaſt*, 484. See *Matthews* v. *Temple*, (ſtated in 18 *Vin.* 408. *pl.* 8.) and *Stratton* v. *Beſt*, (ſtated in Suppl. tit. *Joint-tenants* (L), *ante*.)

So alſo in Doe v. Martin (ſtated in (H) ſupra), where, it was held, that, ſubject to the power of appointment, the remainders veſted in the children on their reſpective births.

18 Vin. 408. (M) Contingent Remainder. What is.

1. MR. *Fearne* defines a contingent remainder in theſe words: "A contingent remainder is a remainder limited ſo as to "depend on an event or condition which may never happen or "be performed, or which may not happen or be performed "till after the determination of the preceding eſtate; for if "the

" the preceding eſtate, (unleſs it be a mere truſt eſtate,) de-
" termine before ſuch event or condition happens, the re-
" mainder will never take effect. Under this definition we
" may diſtinguiſh four ſorts of contingent remainders. *Firſt*,
" Where the remainder depends intirely on a *contingent* deter-
" mination of the preceding eſtate itſelf. *Secondly*, Where the
" contingency, on which the remainder is to take effect, is inde-
" pendent of the determination of the preceding eſtate. *Thirdly*,
" Where the condition, upon which the remainder is limited, is
" certain in event, but the determination of the particular eſtate
" may happen before it. *Fourthly*, Where the perſon to whom
" the remainder is limited, is not yet aſcertained, or not yet in
" being." *Fearne's Cont. Rem.* 4th edit. 3, 4.

2. The ſame author, in *lb.* 333. cautions his readers againſt a miſtake or inaccuracy of expreſſion, in the report given in 18 *Vin.* 415. of the argument of Ch. J. *Lee*, in the caſe of *Smith ex dem. Dormer* v. *Packhurſt*, where the following is given as one of contingent remainders: " 2dly, Where the particular eſtate may
" determine before the remainder can commence, as an eſtate to
" *A.* for life, and from and after the determination of that eſtate,
" then to *B.* during the life of *A.*, this is good by *contingency*,
" that is, if *A.* forfeit his eſtate by alienation or otherwiſe in his
" lifetime." To ſatisfy his readers of the erroneouſneſs of this paſſage, Mr. *Fearne* refers them to the following one, which occurs a few lines lower, in the ſame argument: " As a leaſe to
" *A.* for life, remainder to another during the life of *A.*, this is
" good, becauſe of the poſſibility the remainder may take effect, by
" the tenant for life's alienating or committing a forfeiture; this
" poſſibility is therefore conſidered as an *intereſt in the grantor*,
" which he may limit, and is that ſort of intereſt which the truſ-
" tees have for preſerving contingent uſes, and is not a mere
" right of entry, *nor a contingent remainder, but a* veſted eſtate,
" to take effect by thoſe ways and methods of determination to
" which the particular eſtate was ſubject when it was created."
See this caſe of *Smith* v. *Packhurſt*, reported in 3 *Atk.* 135. and 4 *Bro. Par. Caſ.* 353. 405. See alſo *Butl.* note 2. *Co. Litt.* 265. *a.*

3. Teſtator deviſed a meſſuage, *&c.* to his wife and daughter, during their natural lives and the life of the longer liver of them, in equal proportions; but in caſe the daughter ſhould happen to marry and leave iſſue of her body lawfully begotten, then and in that caſe, *after the deceaſe* of his wife, he deviſed the ſaid meſſuage, *&c.* unto his daughter and her heirs; but if his daughter ſhould happen to die ſingle and unmarried, and without iſſue of her body lawfully begotten, then and in that caſe, he deviſed the premiſes unto his ſaid wife and her heirs for ever. The teſtator left his ſaid wife, and his daughter, who was his heir at law. The widow died, and after her death the daughter ſuffered a recovery; and the queſtion was, Whether the limitation over to the widow and her heirs, was barred by the daughter's recovery? Amongſt other arguments, it was contended for the plaintiff, that the limitation to the daughter in caſe ſhe ſhould marry and have iſſue of

her body, was not to wait till the natural expiration of the firſt eſtate for life to her; but was to take effect in her lifetime, as ſoon as the contingency on which it was limited ſhould happen and it was therefore not a remainder but a conditional limitation; and that this limitation was good only by way of executory deviſe, and if ſo, the ſubſequent limitation muſt be an executory deviſe alſo, and ſo not barred by the recovery. To this argument it was replied, that if the daughter only took an eſtate for life, then the limitation to the widow was upon a contingency with double aſpect, it was a concurrent remainder in fee, created in the alternative, with a contingent remainder in fee to the daughter; and a recovery having been ſuffered by the tenant for life, every body was barred but the heir at law, which the daughter herſelf was—that the ſecond limitation to the daughter was capable of taking effect as a contingent remainder in fee, and of courſe, that the widow was ſo. Lord *Mansfield*, in delivering the opinion of the court, ſaid, *it was perfectly clear and ſettled*, that where an eſtate can take effect as a *remainder*, it ſhall never be conſtrued to be an executory deviſe or ſpringing uſe. The limitation was here to two perſons and the ſurvivor, ſo that a preceding freehold *would be in the ſurvivor*; and the eſtate over was limited on a contingency upon which a remainder might depend. It was to the daughter and her heirs (not iſſue) if ſhe ſhould marry, and have iſſue; and it muſt have taken effect after the death of the ſurvivor. There was another contingency, on the event of the daughter dying unmarried, and without iſſue (not failure of iſſue,) and upon that event the limitation was to the widow in fee. But that the tenant for life, by the recovery, had barred the contingent remainders. *Buller* J. during the argument obſerved, that, if the daughter had married, and had iſſue, her life-eſtate would not have merged, as contended on the behalf of the plaintiff, becauſe it was not limited to take effect till after the widow's death. *Goodtitle* v. *Billington*, *Dougl.* 753.

Mr. Douglas, in a note to Ib. p 755., takes occaſion, upon the authority of the above ſtated caſe, to animadvert upon the *firſt* of the four claſſes into which Mr. Fearne has, in the *third* edition of his eſſay, diſtributed contingent remainders. For the ground of this animadverſion, and Mr. Fearne's juſtification of his definition, in conſequence of it, ſee the note referred to, and Fearne's Cent. Rem. 12. and 398. 4th edit.

18 Vin. 412.

(N) Contingent Remainder. Supported. How.

1. *A.* deviſed to the uſe of truſtees and their heirs, in truſt for *A. B.* for life, remainder to his firſt and other ſons ſucceſſively in tail, remainder to the future ſons of *C.* ſucceſſively for life, remainder over. *B.* died without iſſue in the teſtator's lifetime; the contingent limitations were taken as executory deviſes, becauſe no child was then born to *C.* Afterwards a child was born to *C.* and died; and a ſubſequent remainder-man claimed the eſtate, upon a ſuppoſition that all the preceding intermediate limitations, which could not veſt at the death of ſuch child, were deſtroyed; as it had been decreed, that, upon the veſting of the executory

executory deviſe in that child, the ſubſequent limitations became *contingent remainders* upon that executory deviſe; (as the reader will ſee by referring to Suppl. tit. *Deviſe*, (L. 4) ſect. 1. *ante*, where this point is ſtated,) but it was held, that the inheritance in the truſtees was ſufficient to ſupport the intermediate *contingent remainders*, till they ſhould come *in eſſe*, although no particular eſtate to ſupport, *&c.* was inſerted; and that the eſtate ſhould not veſt in poſſeſſion, whilſt an object of any preceding limitation might come *in eſſe*. *Hopkins* v. *Hopkins*, *Ca. temp. Talb.* 44. 1 *Atk.* 581. 1 *Veſ.* 268. *Butl.* note 1. ſect. 2. *Co. Litt.* 271. *b.* 15 edit. S. C. See *Chapman* v. *Bliſſet*, (ſtated in 18 *Vin.* 388. *pl.* 14.) *Doe Holmes, and Goodright* v. *Dunham*, (ſtated in (W) *poſt.*)

2. Teſtator deviſed eſtates to his ſon *A.* for life, remainder to truſtees and their heirs during *A.*'s life, to preſerve the contingent uſes and eſtates therein after limited, nevertheleſs to permit *A.* to receive the rents, *&c.* thereof during his life; remainder to the firſt and other ſons of *A.* in tail male, remainder to *B.*; with a proviſo that if *A.* or any ſon of his, to whom the eſtates were ſo limited, ſhould ſucceed to the eſtate of *C.* the limitation of the eſtate to *A.* or any ſuch ſon of his ſhould ceaſe, and the next in remainder ſhould take, as if *A.* or any ſuch ſon were dead. *A.* ſucceeded to *C.*'s eſtate before he had a ſon. It was contended on the behalf of the teſtator's heir at law, that the event which determined the particular eſtate of *A.* alſo determined the ſubſequent limitations expectant upon it, no perſon being then *in eſſe* to take; and that the limitation to the truſtees to preſerve the contingent remainders could not ſupport theſe ſubſequent eſtates, becauſe their right of entry was only for a particular purpoſe, namely to receive the rents and pay them over to *A.*; but on the event of *C.*'s death, and *A.*'s ſucceeding to his eſtate, his right to thoſe rents commenced, and conſequently the truſtees right of entry under the proviſo in the will. But, if ſuch right ſubſiſted afterwards, for the benefit of the perſon next entitled, it was inconſiſtent with the truſt repoſed, ſince, if *A.* had had a ſon before *C.*'s death, that ſon was to take by the proviſo as if *A.* were dead, but the truſtees could only have entered under this right to receive the rents for *A.* But the court of *B. R.*, without ſaying who was entitled to the rents in the *interim*, were clearly of opinion, that the eſtate of the truſtees continued during the whole of *A.*'s life, ſo as to ſupport the remainders. *Doe* v. *Heneage*, 4 *Durnf. & Eaſt*, 13.

(P) Remainder. Deſtroyed by *Act of Law.*

IN *Fearne's Cont. Rem.* 499 4th edit. the author adverts to a ſeeming difference in the books with reſpect to the diſtinction of a remainder, in caſes where the inheritance becomes united to the particular eſtate by *deſcent*.

Thus, he obſerves, that, in *Plunket* v. *Holmes*, (ſtated in 18 *Vin.* 401. *pl.* 9.) the deſcent of the fee on the tenant for life did not deſtroy the contingent remainder; and ſo in *Archer*'s caſe, and alſo in *Boothby* v. *Vernon*, (ſtated in 7 *Vin.* 153. *pl.* 17.) where, note, the wife, inſtead of taking the fee *by the limitation*, which was by will, took it by *deſcent*, as the heir at law of the teſtator.

On the other hand, Mr. *Fearne* notices the reſolution ſaid to have been paſſed in *Wood* v. *Ingerſole*, (ſtated in 18 *Vin.* 417, 8. *pl.* 1.) but obſerves, with Mr. *Viner*, in his ſide note to this caſe, that the words were there held void for uncertainty, and conſequently the other point did not come into queſtion. He then cites *Kent* v. *Harpool*, (ſtated in *ib.* 418. *pl.* 3.) and the following caſe:

Lands were conveyed to the uſe of *A.* and his wife for life, remainder to the uſe of *B.* the ſon of *A.* for his life, remainder to the firſt and other ſons of *B.* in tail, remainder to his daughters in tail, remainder to *A.* in fee; *A.* and his wife died in the life-time of *B.* who afterwards died without iſſue, leaving a wife; the queſtion was, Whether the wife of *B.* was entitled to dower in the lands? And it was decreed ſhe was; and Lord *Hardwicke*, with one of the judges, was of opinion, that the eſtate for life in *B.* was merged by the deſcent of the inheritance upon him, and the contingent remainder deſtroyed. *Hooker* v. *Hooker*. *Ca. temp. Hardw.* 13.

The ſeeming differences in the above noticed caſes Mr. Fearne reconciles by a diſtinction between thoſe caſes, where the deſcent of the inheritance is *immediate* from the perſon by whoſe *will* the particular eſtate and contingent remainders were limited; and the caſes where thoſe eſtates were *not* created by the *will* of the anceſtor, from whom the inheritance *immediately* deſcends on the particular eſtate, which happens, he adds, either in the caſe of a *mediate* deſcent through a third perſon, from the perſon who deviſed the particular eſtate and contingent remainders, or elſe where thoſe eſtates were not created by the *will* of any perſon, from whom the deſcent of the inheritance is derived. Cont. Rem. 4th edit. 503.

(Q) Remainder deſtroyed by *Alteration of the particular Eſtate*; and what ſhall be ſaid ſuch Alteration.

IN *Fearne's Cont. Rem.* 496. 4th edit. the author adverts to a poſition frequently laid down, as in the inſtances ſtated in 18 *Vin.* 419. (Q) *pl.* 4, 5. that any alteration in the nature of the preceding eſtate before a remainder veſts, will deſtroy that remainder. But, notwithſtanding the opinions there expreſſed, he conceives that ſuch alteration muſt be in the *quantity* and not in the *quality* of the particular eſtate; and this concluſion he ſupports on the authority of two adjudged caſes, *viz.* 1ſt, that of *Lane* v. *Pannel*, (ſtated in 18 *Vin.* 390. (F) *pl.* 1.) where he obſerves, the ſeverance of the joint-tenancy did not deſtroy the contingent remainder limited after their joint eſtate; for there it is adjudged, that, becauſe the remainder could not veſt at the death of one of them, (after the ſeverance of the joint eſtate,) it

was

was gone as to one moiety; now this judgment, he adds, was nugatory and groundleſs, if the *ſeverance itſelf* deſtroyed the remainder as to the *whole*. The other caſe adduced is that of *Harriſon* v. *Belſey*, (ſtated in 18 *Vin.* 420. *pl.* 9.)

(S) Contingent Remainder. Determined or revived. 18 Vin. 422.

1. SEE *Fearne's Cont. Rem.* 435. where the author inveſtigates, and from a view of the words and intent of the ſtatute of uſes, diſapproves of the doctrine held in the caſes of *Wegg* v. *Villers*, and *Heynes* v. *Villers*, that where eſtates are limited by way of *uſe*, and are afterwards deveſted and turned to a right, it is requiſite to the execution of the ſubſequent contingent uſes, that either the *ceſtui que uſe* under ſome preceding *veſted* uſe, or elſe that the feoffees to uſes or their heirs ſhould enter, in order to reveſt the eſtates; on a ground, that there muſt, at or after the time when ſuch uſes come *in eſſe*, exiſt a ſeiſin in the feoffees, out of which thoſe uſes may ariſe before they can be executed by the ſtatute.

2. On the caſe ſtated in 18 *Vin.* 418. *pl.* 5. to be put by *Holt* Ch. J. his lordſhip further obſerved, that, if the tenant for life entered for the condition broken, *before* the contingency happened, the contingent remainder, it ſeemed, might veſt. But, in that caſe, if the reverſioner entered for the forfeiture, before the contingency happened, then was the contingent remainder deſtroyed.—As to the remainder veſting, if tenant for life enters before the contingency happens, there is a contrary opinion in 4 *Bacon's Abridg.* 315. where it is ſaid, the contingent remainder ſhall never ariſe, though the condition be broken, and a re-entry made before the contingency happens, becauſe the feoffment, though upon condition, was a forfeiture and determination of the particular eſtate, and the recovery does not purge the forfeiture. But this opinion Mr. *Fearne*, in his Eſſay on *Cont. Rem.* 511. 4th edit. after noticing it to be that of Ch. B. *Gilbert*, controverts, and ſupports that of *Holt*.—Note alſo, that, in *Co. Litt.* 214. *a.* 218. *b.* it is laid down, that, *after* condition broken, the eſtate of the grantee, if a freehold, does not ceaſe till *entry or claim*.

(W) Good or void. In its *Creation*, or by *Event*. [And herein of *concurrent Eſtates. Suppl.*]

1. SETTLEMENT of the wife's lands on herſelf for life, remainder to her huſband for life if any iſſue of the marriage ſhould ſo long live, remainder to all the children in fee; and if ſhe died without iſſue, or ſuch iſſue died under 21, then, as to one moiety, to the huſband in fee. The court of *King's Bench* held, that, upon all the circumſtances of the caſe, the contingency, on which the huſband's eſtate in fee was to ariſe, was that of his

surviving (*viz. living at* the death of) his wife; and that, as he died first, the contingency never arose. *Moorhouse* v. *Wainhouse*, 1 *Black. Rep.* 638.

In Fearne's Cont. Rem. 4th edit. 547. we are reminded, that, although a fee cannot, in conveyances at common law, be mounted on a fee, yet two or more several contingent fees may be limited, merely as substitutes or alternatives one for the other, and not to interfere, but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect, as in Loddington v. Kime, (stated in 18 Vin. 402. and side note)

2. So, where testator devised lands to his son *J. L. with impeachment of waste*, during his life, and after his decease, to *the heirs male or female* lawfully to be begotten of the body of the said *J. L. for ever*, they *paying out of the same* a sum of 400*l.*, 200*l.* part thereof to *E. B.*, which legacy he willed should be paid within two years *after the death* of the son *J. L.*; and upon neglect of payment, he devised the lands to *E. B.* and her heirs, for such a term of years, as the said sum might be raised out of the rents and profits thereof. And afterwards, that the land should return into the possession, and for the sole use of the *heir-male* or *female* lawfully begotten by the said son, and to his and her *heirs for ever*. But if his said son *J. L.* should die, *leaving* no lawful issue, he then gave the lands to *E. B.*, her heirs and assigns for ever. *J. L.*, after the testator's decease, suffered a recovery to the use of himself in fee, and died, without having, or ever having had any issue. The question was, whether the remainder to *E. B.* was barred by this recovery? It was contended, that it was not; for that *J. L.* took only an estate for life, with a contingent remainder in tail to his issue, and a vested remainder in fee to *E. B.*; in which case *J. L.*, being only tenant for life, could not by his recovery bar such vested remainder. We are to observe (with Mr. *Fearne*), that it was necessary to contend that the limitation to the heirs male or female, *&c.* of *J. L.* was a *contingent* remainder, and did not *vest* in *J. L.*, and also that it gave a remainder in *tail* only to such issue, and not in *fee*; for, if this limitation vested an estate tail in *J. L.*, then his recovery indisputably barred the remainder in *E. B.*; and, if it gave a contingent remainder *in fee* to the issue of *J. L.*, then the other remainder to *E. B.* must be contingent likewise (because no remainder can vest after a contingent fee is first limited), and then it was destroyed by the recovery of *J. L.* the tenant for life. But the court, without determining whether *J. L.* took an estate only for life or in tail, were clearly of opinion, that take which he would, as he certainly took a freehold sufficient to support a contingent remainder, the limitation to *E. B.* could not enure as an executory devise; because that is not admitted where there is a preceding freehold capable of supporting a contingent remainder; and then, as a remainder, if *J. L.* took an estate tail, it was clear his recovery barred it; if he took only for life, then they were clear, that the subsequent limitation to the heirs male or female, *&c.* of *J. L.* was a good contingent remainder in fee simple; and of consequence the limitation to *E. B.* must also be contingent and not vested; for a remainder cannot vest after

after a remainder in fee. And in this case such limitation must be concurrent with that to the heirs, &c. of *J. L.*, to take effect in lieu of it, if that failed. Therefore they adjudged, that the remainder to *E. B.* was barred or destroyed. *Doe* v. *Holmes*, 3 *Wilf.* 237. 241. 2 *Black. Rep.* 777. S. C.

3. Testator devised to his son *J. L.* for life, and, after his death, to all and every his children equally, and to *their heirs*; and, in case *his said son died without issue*, he gave the premises unto his, the testator's, two daughters, and their heirs, equally to be divided between them. *J. L.* entered and suffered a recovery, and died without ever having had any issue. It was admitted, that *J. L.* took no more than an estate for life. But it was contended, that the words *their heirs* in the limitation to his children meant *heirs of the body*; the limitation over being to the testator's sisters, who came within the line of *collateral* heirs of such children. But here the words, introducing the limitation to the *sisters*, were not, in *default of heirs of the children*, but in case *the son should die without issue*, which being tacked to the *preceding clause*, the court held must mean the same thing, as "*in case he died without children.*" They had none of them a doubt, that both limitations (*viz.* to the children of *J. L.* and to the testator's sisters) were *contingent remainders*; there were no expressions to restrain the sense of the word "*heirs*," in the limitation to *J. L.'s children*. That the word *heirs*, in the limitation to the daughters, certainly did not mean "*heirs of the body*," and they could not give the same words two *different* senses in different parts of the said will. The consequence of this opinion was, that the recovery barred the remainder to the sisters. *Goodright* v. *Dunham*, *Dougl.* 251.

4. Testator devised lands to his daughter for her life, remainder to trustees to preserve, &c., then to all and every the children of the said daughter by her husband *C.* and their heirs for ever, to be equally divided between and among such children, if more than one, share and share alike; but if only one such child, then to such only child, his or her heirs for ever; and, in *default of such issue*, to *C.* for life. It was held, that the limitation to the children was a contingent remainder in fee; which having vested in their children born after the testator's decease, though dying in their parent's lifetime, the subsequent remainders were thereby precluded from taking effect. For the court held the words, in default of *such issue*, to mean in default of *such children*. *Doe* v. *Perryn*, 3 *Durnf. & East*, 484.

Upon the three last cases, we may observe, with Mr. Fearne in p. 552. of his Cont. Rem. 4th edit., that the words introducing the remainders over, after the limitations to the heirs, &c. or children, were not allowed to abridge or qualify the extent of the words *heirs* limiting the *fee* to such heirs, &c. or children, as they would have done, if they had been referable to the words of limitation to the heirs, &c. or children. In the two first, they *expressly* applied, *not* to issue of the heirs, &c. or children, but to issue of the parents, and there was no circumstance to extend the construction beyond the words; consequently the reference rested with the expression, and was confined to the heirs, &c. or children themselves, as the *issue before mentioned*. And, in the last case, there being no sort of apparent intention or ground, for referring the words, "*such issue*," to heirs of the children, which children themselves were the issue *before mentioned*, they were very reasonably referred to such children. See too Doe v. Burnsall, 6 Durnf. & East, 30.

5. Devise was to *G. P.* for life, remainder to her first and other *sons in tail general*, "and for *default of such issue* male," remainder over;

over; it being contended that the word *male* might be rejected, the court ſaid, they could not do it; but held, that the remainder over was a *contingent* deviſe only, on the event of there never being a ſon; and if there were a ſon ever born, though he died, the remainder over would be void. In that caſe, it ſeems, a ſon was born, who died during the life of *G. P.*, and on his birth the eſtate veſted in him; and the limitation over, it ſeems, failed. Here the court referred the words *ſuch iſſue male*, to *ſons* before mentioned. *Keene* v. *Dickſon*, *M.* 24 *G.* 3. in *B. R.* cited in 3 *Durnf. & Eaſt*, 495. See *Ives* v. *Legge*, and *Doe* v. *Reaſon*, ſtated in Suppl. tit. *Deviſe* (A. b), ante.

12 Vin. 428.

(X) Croſs Remainders.

1. TESTATOR deviſed lands to his wife for life, and after her deceaſe, to his ſon and daughter *A.* and *B.* to be equally divided between them, and the *ſeveral and reſpective iſſues of their bodies*; and, for want of ſuch iſſue, to his wife in fee. Lord C. *Hardwicke* held, that this deviſe did not create croſs remainders between *A.* and *B.*, ſince they can only be raiſed by an implication abſolutely neceſſary, which was not the caſe here, for the words "*ſeveral and reſpective*" effectually disjoined the title; and his lordſhip obſerved, that there was no caſe where croſs remainders had been adjudged to ariſe merely upon the words "*in default of ſuch iſſue.*" *Davenport* v. *Oldis*, 1 *Atk.* 579.

2. Deviſe to truſtees, in truſt, as ſoon as teſtator's three daughters attained their reſpective ages of 21, to convey to them, and the heirs of their bodies *as joint-tenants, and for want of ſuch iſſue then over.* Lord *Hardwicke*, after aſſuming to himſelf a latitude of conſtruction from the direction to convey, obſerved, that it was impoſſible the daughters could take ſtrictly as joint-tenants, the teſtator having directed reſpective conveyances, which, as well as the ſubſequent limitations, would occur at different times; but he ſaid, he would give the words their effect *cy pres*, agreeably to the intention of the teſtator, by conſtruing them like joint-tenants, ſo as to create croſs remainders between them; and he decreed accordingly. *Marryat* v. *Townley*, 1 *Veſ.* 102.

3. A feme covert, purſuant to a power, appointed lands by will to the uſe of her huſband for life, with a limitation to truſtees to preſerve, *&c.* remainder "to her ſons to be begotten on her body, "and in default of ſuch iſſue, to the uſe of *all and every* the "daughter and daughters of her ſaid huſband and her the teſta- "trix to be begotten, *and to the heirs of their body and bodies*, ſuch "daughters, if more than one, to take as tenants in common, and "not as joint-tenants, *and for default of ſuch iſſue*, to the uſe of "her right heir." The teſtatrix died, leaving two daughters. The queſtion was, whether they took croſs remainders or not by this deviſe? The court of *K. B.*, for whoſe opinion the caſe was ſent from Chancery, certified as follows: "There are no words "in the inſtrument which intimate any intention to limit over "the

" the *reſpective* ſhares of the two daughters dying without iſſue of " their bodies *reſpectively*; on the contrary, the limitation over is " of the *whole* eſtate, limited to *all* the daughters, and was to take " place on the expreſs contingency of failure of *all and every* the " daughters, and the iſſue of *their body and bodies*, and the limita- " tion over on the default of *ſuch* iſſue is to the heir at law. Con- " ſequently, we are of opinion, that, as nothing is given to the " heir at law, whilſt *any* of the daughters or *their iſſue* continue, " they muſt, among themſelves, take croſs remainders." Lord *Manſfield* added, that the introductory words of the certificate were emphatically put in, in anſwer to the caſes of *Comber* v. *Hill* (ſtated in 8 *Vin.* 330. *pl.* 4.) and *Williams* v. *Browne*, 2 *Stra.* 996. cited in favour of the contrary opinion. *Wright* v. *Holford*, *Cowp.* 31. and ſee queſtion in *Wright* v. *Englefield*, *Ambl.* 468. 6 *Bro. Parl. Ca.* 156. S. P.

4. Teſtator deviſed lands to his brother, and his iſſue male and female, in the uſual courſe of ſtrict ſettlement, remainder to his four ſiſters, and a niece, for their lives, *ſhare and ſhare alike, as tenants in common*, and not as joint-tenants; remainder to their ſons *ſucceſſively* in tail male, remainder to their daughters in tail, reverſion to his own right heirs. And he deviſed to another ſiſter only a ſmall annuity, and died, leaving his brother his heir at law. The court of *B. R.* held, that the four ſiſters and the niece took ſeveral eſtates for life, with ſeveral remainders to their ſons and daughters ſucceſſively in tail, and that there were no croſs remainders between them; Lord *Manſfield* remarking, that the ſtrongeſt argument was afforded for ſaying that the word "*reſpectively*" which, if expreſſed would have barred the implication, was here ſupplied by ſynonimous expreſſions. And his lordſhip obſerved, that, with reſpect to croſs remainders, the rule was, that wherever they were to be raiſed by implication between *two*, the preſumption of law was *in favour* of them, but where between *more* than *two*, there it was *againſt* them; but ſtill controlable by circumſtances of manifeſt intention either way. *Pery* v. *White*, *Cowp.* 777.

5. Teſtator deviſed lands to his two brothers *A.* and *B.* and his ſiſter *C.* and the heirs of their bodies, *as tenants in common*, and not as joint-tenants; *and for want of ſuch iſſue*, to his own right heirs. And he gave all the reſidue of his goods and chattels, as well *real as perſonal*, equally between his ſaid brothers and ſiſter, ſhare and ſhare alike. The queſtion was, whether croſs remainders were created by the will? Lord *Manſfield* obſerved, that the reaſon given in the old caſes againſt raiſing croſs remainders was to prevent the ſplitting of freeholds, which had then no weight. He adverted to Lord *Hardwicke*'s obſervation in the before ſtated caſe of *Davenport* v. *Oldis*, but obſerved, that ſince that time, in the before ſtated caſe of *Wright* v. *Holford*, the court went expreſsly upon the diſtinction of there being no words, ſuch as "*reſpectively*," to ſever the titles; but that the limitation over being "in default of *all* the iſſues," the rule of conſtruction laid down in favour

favour of croſs remainders, as between two, ſhould obtain; ſtill, however, where there were *more* than *two*, there muſt be ſome circumſtances in the caſe indicative of the teſtator's intention to encounter the rule of law laid down in the above ſtated caſe of *Pery* v. *White*. His lordſhip then proceeded to conſider the circumſtances of the caſe before him, and ſhewed, that the teſtator's intention could not be completely effectuated, but by raiſing croſs remainders; and he adds, that he thought the caſe as ſtrong as that of *Wright* v. *Holford*. And the court of *B. R.* were of opinion, that the deviſees took croſs remainders by implication. *Phipard* v. *Mansfield*, *Cowp.* 797.

6. Deviſe in remainder expectant upon certain previous limitations, which afterwards determined, "to all and every the "daughter and daughters of *M.*, and the heirs male of the body "of ſuch daughter or daughters, equally between them, if more "than one, as tenants in common and not as joint-tenants, and "for and in default of *ſuch* iſſue the teſtator gave and deviſed *all* "the ſaid premiſes unto his right heirs." On a caſe referred for the opinion of *B. R.* the queſtion was, whether the daughters took croſs remainders. Lord *Kenyon* admitted it to be true, as contended againſt the croſs remainders, that as between two, it muſt be preſumed, that croſs remainders were intended to be raiſed; but that, if there were *more* than two, it was neceſſary to reſort to other words in the will, to diſcover an intention to raiſe croſs remainders. The words, however, he thought, in the caſe before him, clearly imported that the *whole* ſhould go together, which intention could not be fulfilled, but by raiſing croſs remainders. *Buller* J. obſerved, that this caſe was a ſtronger caſe than *Phipard* v. *Mansfield* (before ſtated), for here, beſides the words "for want of *ſuch* iſſue," namely, iſſue of all of them, the deviſe over was of *all* the deviſor's eſtates, which could not go together, but by raiſing croſs remainders between the daughters of *M.* And the court unanimouſly certified accordingly. *Atherton* v. *Pye*, 4 *Durnf.* & *Eaſt*, 711. See *Twiſden* v. *Lock*, *Ambl.* 663. a caſe ariſing on marriage articles, with power to lay out the truſt money in land.

7. Conveyance of lands to truſtees to the uſe of ſettlor for life, remainder to *B.* for life, remainder to truſtees, *&c.* remainder to the uſe of ſuch child or children of *B.* as he ſhould appoint; and in default of ſuch appointment, to the uſe of all and every the children of *B.* and the heirs of their ſeveral and reſpective bodies as tenants in common, but if only one ſuch child, to the uſe of ſuch only child, and the heirs of his or her body, remainder to the right heirs of ſettlor. *B.* died without appointing. Held that *B.*'s children took veſted intereſts as tenants in tail, but without croſs remainders; and that, on the death of each child without iſſue, his ſhare fell into the reverſion; Lord Ch. J. *Kenyon* obſerving, that the rule eſtabliſhed in *Cole* v. *Levingſtone*, 1 *Ventr.* 224. that, in the caſe of a *deed*, croſs remainders cannot be implied, had never been departed from. *Doe* v. *Fanner*, 5 *Term Rep.* 518.

Removal.

(A) Of Removals of poor Perſons and others. In what Caſes. And Power of Juſtices as to Removals. 18 Vin. 457.

1. BY 24 *G.* 3. *ſeſſ.* 2. *c.* 6. ſuch officers, mariners, ſoldiers, and marines, who have ſerved ſince *April* 1, 1763: and alſo all ballotted militiamen who have perſonally ſerved from the ſaid 1ſt of *April* for three years, and have been honourably diſcharged, and alſo their wives and children may ſet up trades in any city, town corporate, or other place, without any moleſtation by reaſon of uſing ſuch trade, nor ſhall they, or their wives or children, during the time they ſhall exerciſe ſuch trades, be removeable to their place of ſettlement until they ſhall become actually chargeable. Two juſtices may in the mean time ſummon and examine them concerning their place of ſettlement, and ſhall give them an atteſted copy of their affidavit, which ſhall be admitted as evidence in any general or quarter ſeſſions.

2. The adjudication therefore with regard to ſuch perſons muſt be *that they are chargeable*, and not that they are likely to be chargeable.

3. By 26 *G.* 3. *c.* 107. *ſ.* 131. every perſon having ſerved in the militia, when drawn out into actual ſervice, being a married man, may ſet up and exerciſe any trade in any town or place within *Great Britain* without moleſtation, and no ſuch militiaman ſhall be liable to be removed out of any ſuch town or place until he is become chargeable to the pariſh.

4. An huſbandman, who is married, and ſerved in the militia three years in actual ſervice is removeable before he becomes actually chargeable, for the 26 *G.* 3. relates only to thoſe who exerciſe ſome trade. *Rex* v. *Gwenop*, 3 *Term Rep.* 133.

5. But a militiaman, who has ſerved, *&c.* cannot be removed before he has ſet up the trade, if he go to the place for the purpoſe, for he who is privileged *morando* is privileged *eundo*. *Per Buller* J. *Ib.* 136.

6. By 7 *G.* 3. *c.* 40. *ſ.* 46. the gate-keeper at any turnpike ſhall not be removeable from the toll-houſe until he become actually chargeable.

Of Certificates. *Form of it.*

1. A Mandamus was moved for to compel the churchwardens and overſeers to ſign a certificate, but the court rejected the motion as a ſtrange attempt. *Rex* v. *St. Ives*, 2 *Seſſ. Caſ.* 128.

2. A pauper *came into* and reſided in the pariſh of *A.* with a certificate *from W.* addreſſed to *B. W.* was obliged to receive the pauper again, for a miſdirection dont vitiate a certificate; it being a general acknowledgment of the *pauper*'s being a pariſhoner; and is concluſive againſt them for all the world. *Rex* v. *St. Nicholas in Harwich, Burr. Seſſ. Caſ.* 171. *Sed Quare.* For *per* Lord C. J. *Ryder*, no third pariſh has a right to claim that benefit from the proviſions of the certificate act, which was only intended to extend to that ſingle pariſh to which the paupers came certificated.

3. The rule will not hold generally, that every pariſh is bound to receive a *pauper* who comes with a certificate which is not directed to them. *Rex* v. *High and Low Biſhopſide, Burr. Seſſ. Caſ.* 381. *Say. Rep.* 231. *Vid.* alſo *Rex* v. *Lubbenham*, 4 *Term Rep.* 251. The opinion of Lord *Kenyon* C. J.

4. A certificate was ſigned by two churchwardens and two overſeers in a pariſh where it was the uſage to have ſix of the former and four of the latter. The court thought this certificate not to be concluſive on the pariſh granting it, as not being under the hands and ſeals of the major part of the churchwardens and overſeers, for the words of the ſtatute are poſitive to that effect. *Rex* v. *Tamworth, Burr. Seſſ. Caſ.* 770.

5. *Longunwel* and *Morgan, Seſſ. Pa., E.* 27 *G.* 3. 1 *Term Rep.* 775. and the court there ordered the ſeſſions to enquire into a fact which appeared doubtful on the original order of removal, although the ſeſſions had ſtated no caſe.

6. The pauper reſided under a certificate, which the caſe made for the opinion of K. B. ſtated there was reaſon to believe had been deſtroyed by fire. The certificating pariſh refuſing to grant another certificate, and the pauper being likely to become chargeable, he was removed by an order of two juſtices, which was confirmed by the ſeſſions. The court of *K. B.* quaſhed both, but there was no cauſe ſhewn. *Rex* v. *Hayden, Eaſter*, 27 *G.* 3. 2 *Bott* by *Conſt.* 707. *Pl.* 662.

7. A pariſh conſiſted of ſeveral hamlets, one of them maintained its own poor, and had ſeparate churchwardens and overſeers, who grant a certificate, naming themſelves overſeers of the poor of the pariſh at large. Evidence is admiſſible that they were the officers of the hamlet, and that it maintained its own poor. For this does not contradict, but explain the certificate, and conſequently the certificate binds the hamlet. *Rex* v. *Samborn*, 3 *Term Rep.* 609.

8. A cer-

8. A certificate not ſigned by the juſtices is void, though regular in other reſpects, and though the pariſh granting it had relieved the pauper ſubſequently. *Rex* v. *Wootton St. Lawrence*, *Burr. Seſſ. Caſ.* 581.

9. A certificate was duly ſigned by the pariſh officers, and atteſted by *A. B.*, who made his mark, and *P. J.* who wrote his name. The allowance of it by two juſtices, ſtated that *P. J.* ſwore that he was preſent with the other witneſs, and ſaw the officer ſign and ſeal, and that his name is his own hand-writing. The court were clear that this was a ſufficient proof of the atteſtation of *A. B.* *Rex* v. *Aſhton Keynes*, *Burr. Seſſ. Caſ.* 725.

10. Two juſtices atteſted a certificate ſigned by the churchwardens. The court thought that they might act both as juſtices to allow, and witneſſes to atteſt; but their ſubſcribing as witteſſes is not an allowance without words to that effect. *Rex* v. *Boſton*, *Stra.* 94. *Fort.* 301.

11. An allowance of a certificate, as having been duly executed, written in its margin, and ſigned by two juſtices, is ſufficient proof of the certificate where it is above 30 years old, notwithſtanding the allowance does not certify the affidavit of one of the witneſſes, as to the due execution and atteſtation of the certificate. For being acted upon ſo long it proves itſelf as a deed does. For the 3 *G.* 2. *c.* 29. was paſſed for the purpoſe of facilitating the mode of proving certificates, and was not intended to take away any mode of proof which exiſted before it. *Rex* v. *Farringdon*. 2 *Term Rep.* 466. But *Aſhurſt* and *Groſe* Juſtices, doubted whether it would have been good if the queſtion had ariſen ſoon after the certificate was granted, and the parties had relied on the ſufficiency of this allowance under 3 *G.* 2. *c.* 29. *Buller* J. *contrà*. For it ſtates that they have allowed the certificate as being firſt proved to be duly executed as the ſtatute in that caſe directs and appoints. To ſupport it therefore the court will, as in the caſe of an order, intend that the forms required in that act were purſued, ſince without that the certificate would be falſe. *Ib.*

To whom it extends.

1. A Pauper coming into a pariſh, marries a ſecond wife while there, by whom he has a ſon, the certificate extends to the child. *Rex* v. *Sherborne*, *Burr. Seſſ. Caſ.* 182. 2 *Str.* 1165.

2. So where the ſon was born while his father reſided under a certificate, and of the age of 20 when he was hired in the certificated pariſh for a year. *Rex* v. *Bray*, *Burr. Seſſ. Caſ.* 259. 1 *Wilſ.* 121. *Rex* v. *Buckingham*, *Burr. Seſſ. Caſ.* 314. S. P.

3. A certificate only includes the man to whom it is granted, his wife and thoſe children who live with him, but does not extend to grandchildren, ſo as to prevent their gaining a ſettlement in the pariſh certified to. *Rex* v. *Darlington*, 4 *Term Rep.* 797. *Rol. Rep.* 124.

Its Effect as to the Pariſhes certificating and certified to.

1. WHERE two pariſhes jointly purchaſe a houſe for the reception and maintenance of the poor in a third pariſh, and ſend all their poor with certificates properly authenticated there, ſuch paupers are not removeable until they become actually chargeable; for the protection of certificates is to be extended to the utmoſt latitude. *Rex* v. *St. Peters and St. Pauls, Bath, Cald.* 213.

2. A man went with a woman reputed his wife to reſide in *N.* (under a certificate from *W.*) where they had ſix children. It appeared after his death that ſhe was never married. *W.* is concluded by the certificate from diſputing the validity of the marriage and the children are ſettled there. *New Windſor and White Waltham, Stra.* 186.

3. So where the certificate acknowledges a woman to be the wife of the pauper, and it appears afterward that he had another, whom the certificating pariſh is bound to maintain. *Rex* v. *Headcorn, Burr. S. C.* 253. 2 *Seſſ. Ca.* 200. *Stra.* 1233.

4. So where the certificate acknowledges the pauper and his ſon, who was not born in the pariſh, to be ſettled there, and the father, when he had applied for it, had ſuppreſſed the fact of his child's being a baſtard, but no fraud appeared on any ſide. *Rex* v. *Toſtock, Burr. Seſſ. Ca.* 737.

5. So where a certificate was kept in the pauper's poſſeſſion till after the pariſh granting the certificate had removed her, it was held concluſive againſt the pariſh granting it, *as to a prior ſettlement*. *Rex* v. *Buckingham, Cald.* 64.

6. An order of removal of a certificated perſon from a third pariſh to the pariſh to which he was certified, if unappealed from, is concluſive againſt that pariſh on a ſubſequent removal to the certifying pariſh. *Rex* v. *Ealing, Mich.* 25 *G.* 3. 2 *Bott* by *Conſt.* 727. *Pl.* 645.

7. In *Honyton* and *St. Mary-Axe* it was held, that the pariſh granting a certificate was concluded by it as to all pariſhes whatever. 2 *Salk.* 535. *Foley* 177.

8. But in *All Saints* v. *St. Giles*, Lord *Holt* ſaid, that as to all other pariſhes except that to which the certificate is given, the pariſh granting it is in the ſame ſituation it was before the certificate, and that the concluſion extended no further than the pariſh to which the certificate was directed. *Salk.* 531.

9. And in a late caſe it was held, that where the pariſh of *A.* granted a certificate to that of *B.*, acknowledging the pauper and his wife to be their pariſhioners, it is competent to *A.* as between that pariſh and *C.* to ſhew that the ſuppoſed wife had a former huſband living at the time of the marriage with the pauper; and the authority of *Honyton* and *St. Mary-Axe* was denied. *Rex* v. *Subbenham*, 4 *Term Rep.* 251. But this certificate is very ſtrong evidence

evidence of a ſettlement in the pariſh, granting it even where it is not concluſive. *Per Holt* C. J. *Salk.* 530. *Per Buller* J. 4 *Term Rep.* 256.

How a Settlement may be gained after Reſidence under a Certificate, and when it is conſidered to be *functus Officio*.

1. A Certificate is not concluſive againſt a ſettlement gained after it was granted. *Harriſon* v. *Lewis*, 3 *Salk.* 253.

2. An apprentice to a perſon reſiding under a certificate is aſſigned to an inhabitant of another pariſh, where he inhabits and ſerves five years, he gains a ſettlement. *Pethom* and *Dymchurch*, *Stra.* 1147.

3. S. P. by *Denniſon* J. *Rex* v. *Sherborne*, *Burr. Seſſ. Caſ.* 186.

4. So where a boy reſiding with his father under a certificate is put out apprentice into a third pariſh, and ſerves there, he gains a ſettlement. *Rex* v. *Selton*, *Burr. Seſſ. Caſ.* 269. 1 *Wilſ.* 184.

5. So where a certificated man purchaſed a freehold tenement in a third pariſh and went to reſide there, and delivered his certificate to the officer there, his apprentice gains a ſettlement. *Rex* v. *High and Low Biſhopſide*, *Burr. Seſſ. Caſ.* 381. *Say.* 231. *Rex* v. *St. Peter's in Nottingham*, S. P. *Burr. Seſſ. Caſ.* 391. *Say.* 287.

6. If a perſon ſettled at *A.* lives on his own eſtate at *B.*, and while there receives a certificate from *A.*, the certificate is diſcharged by ſubſequent reſidence on his eſtate at *B.* *Rex* v. *Uſton*, 3 *Term Rep.* 251.

7. So the ſon of a certificated man, born in the pariſh to which his father comes by certificate, gains a ſettlement in a third pariſh by hiring and ſervice for a year. *Rex* v. *Horſley*, *Burr. Seſſ. Caſ.* 385. *Say.* 228.

8. A perſon reſiding in a pariſh under a certificate is bound and ſerves an apprenticeſhip in another pariſh; ſhe gains a ſettlement by a ſubſequent hiring and ſervice for a year in the pariſh to which ſhe had been certified; for the certificate was diſcharged by the apprenticeſhip. *Rex* v. *Great Torrington*, *Burr. Seſſ. Caſ.* 428. *Rex* v. *Keynſham*, S. P. *Ib.* *Rex* v. *Aſhchurch in Glouceſterſhire*, S. P. *Ib.*

9. A pauper and his family reſiding under a certificate becoming chargeable are removed. A ſon who had reſided in that pariſh under it gains a ſettlement there by inhabiting ſubſequently as an apprentice; for the certificate is *functus officio*, having had its effect once by the removal. *Rex* v. *Sudbury*, *Burr. Seſſ. Caſ.* 373. *Say.* 200.

10. A certificate is granted to a perſon from *A.* to *B.*, who, after reſiding in *B.* ſome time, returns to *A.* has a ſon there and dies; his ſon is married and lives ſeparated from his father during his lifetime, and 54 years after the granting the certificate a

grandſon is bound apprentice by the pariſh into *B.*; he gains a ſettlement, for the certificate after ſuch a deſertion is at an end. *Rex* v. *Taunton, St. Mary Magdalen, Burr. Seſſ. Caſ.* 402.

11. An apprentice to a maſter who is certificated to and reſides at *C.* removes with him to *S.*, where he ſerves 40 days and upwards; he then marries a wife who lived at *C.*, where he ſlept at nights, but worked during the day at *S.* The apprentice gained a ſettlement at *S.*, but not by ſleeping ſubſequently at *C.*; for the removal of the maſter being voluntary his certificate remains, and the apprentice being part of his family can gain no ſettlement there. *Rex* v. *Spotland, Burr.* 527.

12. The pauper having taken a tenement of 10*l.* a-year reſided thereon for a month, when he obtained a certificate from the pariſh in which he had been formerly ſettled; he afterwards reſided upon this tenement 40 days. Held, that he gained a ſettlement in the pariſh where this houſe lay, although the taking was not after the certificate. *Rex* v. *Findern, Eaſt.* 24 *G.* 3. 2 *Bott* by *Conſt*, 440. *Pl.* 653.

13. A certificate is diſcharged by an order of removal from a third pariſh to the certifying pariſh; and a freſh certificate granted to another pariſh diſcharges the old certificate. *Rex* v. *Birdham, Hil.* 25 *G.* 3. 2 *Bott* by *Conſt*, 742. *Pl.* 654. *Rex* v. *St. Peters in Derby*, 1 *Term Rep.* 218. S. P. as to the diſcharge of an old certificate by a new one.

14. A certificated perſon returned into the certifying pariſh had a ſon and remained there 18 years, when he died. The ſon gains a ſettlement by hiring and ſervice for a year in the pariſh certified to. *Rex* v. *Frampton upon Severne, Doug.* 402. *Cald.* 97.

15. The pauper was born, and reſided after her father's death under a certificate granted to him, and when of the age of ſeven years ſhe went voluntarily into the certifying pariſh, where ſhe remained ſeven years, ſerving ſeveral years under yearly hirings, and then voluntarily returned to her brother, who was ſtill reſident in the ſame houſe, under the certificate, and was named in it. This is no diſcharge of the certificate ſo as to admit her to gain a ſettlement. *Rex* v. *Keel, Cald.* 144.

16. A certificated perſon removes with his whole family, firſt to one pariſh, and in two years to another, where in four years he died. His ſon may gain a ſettlement by a year's hiring and ſervice in the pariſh to which the certificate was granted. For, *per cur. A certificate is an indemnity to the pariſh to which it is granted from the conſequences of permitting him to reſide there.* It has done its office the moment that reſidence is at an end. A temporary abſence for a particular purpoſe wont diſcharge it; but when the pauper has left the certified pariſh, as here, for years, and neither party has any reliance upon it, it has no operation. *Rex* v. *Newington*, 1 *Term Rep.* 354.

Of the Removal of certificated Perſons.

1. A Certificated family being ill, received relief from a pariſhioner, who was reimburſed by the pariſh officers; they ſhall not, on account of ſuch relief, be removed as having become actually chargeable. *Rex* v. *Kingswood*, *Burr. Seſſ. Caſ.* 392.

2. A perſon reſided under a certificate with his family; his daughter of the age of 18, being big with a child afterwards born a baſtard, aſked and obtained relief of the certificated pariſh. *Aſhton* J. inclined to be of opinion, that the reſt of the family were not on this account removable; for the certificate act requires that the juſtices ſhould adjudge that the perſon is actually become chargeable, which they cannot do upon a perſon who is in fact not ſo. *Rex* v. *Framlingham*, *Burr. Seſſ. Caſ.* 748.

3. The ſon of a certificated man married, and *lived ſeparate from his father*; the ſon before his death, and his wife, and her children, aſked and received relief from the pariſh certified to. The grandfather and his family are not removable on this account. *Rex* v. *St. Mary*, *Weſtport*, 3 *Term Rep.* 44.

4. A certificated man's daughter, reſiding with him, being pregnant with a baſtard child, is not a ſufficient ground for his removal; for he or his family muſt firſt become actually chargeable, and *non conſtat* but the daughter may be married before ſhe is brought to bed. *Ib.*

5. If a certificate promiſes to receive a perſon and his family *when requeſted*, it means when legally requeſted, that is, after the paupers become chargeable, otherwiſe it would be contrary to 8 & 9 *W.* 3. *c.* 30., and void. *Ib.*

For more concerning *Certificates vide Orders of Removal, Settlement of the Poor by Birth.*

(E) Orders of Removal, good as to the Form or Manner *in general.* 18 Vin. 463.

1. ORDER quaſhed, which only ſaid, We order him to be removed to ſuch a place as the place of his laſt legal ſettlement, without adjudging that to be the place. *Rex* v. *Weſtwood*, *Stra.* 73.

2. Order ſtates that the perſon is not become chargeable, and no adjudication that he is likely to become chargeable, quaſhed. *Rex* v. *Minchinghampton*, 2 *Seſſ. Caſ.* 93.

3. Order adjudges that a man was ſettled at ſuch a place, and removes his widow thither, quaſhed, for there is no adjudication of the woman's ſettlement, and ſhe might have gained one after his death. *Eglium* v. *Hartley-Wintley*, 1 *Seſſ. Caſ.* 45.

4. Adjudication, that the laſt legal place of the pauper is *W.*, quaſhed, for it is no adjudication of the ſettlement. *Rex* v. *Warnhill*, 1 *Seſſ. Caſ.* 92.

5. An order of ſettlement, removing nurſe children to their derivative ſettlement, without taking notice of the death or ſettlement of their parents, is good. *Rex* v. *Bucklebury*, 1 *Term Rep.* 164.

6. The order was, "Whereas we, the ſaid juſtices, upon examination *of the premiſes* upon oath, and other circumſtances, do adjudge the ſame to be true," and held ſufficient, for it need not ſtate an examination or ſummons of the pauper. *Rex* v. *Bogworth*, *Cald.* 179.

The *Examination* of the Pauper.

1. THE examination of a pauper, for the purpoſe of removal, muſt be taken and ſigned by the ſame two juſtices in the preſence of each other. *Rex* v. *Howarth*, 13 & 14 *G.* 2. 2 *Bott* by *Conſt*, 769. *pl.* 701.

2. If two juſtices take the examination of the pauper relative to his ſettlement, but do not remove him, and the pauper afterwards dies or becomes inſane. *Qu.* Whether two other juſtices may remove his family upon that examination? Lord *Kenyon* C. J. and *Groſe* J. *pro.* *Aſhhurſt* and *Buller*, Juſtices, *contra.* *Rex* v. *Eriſwell*, 3 *Term Rep.* 707.

18 Vin. 466. (G) Orders of Removal good in reſpect of *former Orders.*

1. HUSBAND and wife are removed from *N.* to *W.* and no appeal; they return to *N.* and have three children, who are now ſent with the father to *W.* On appeal, it was offered in evidence, that the man had a former wife, and that the children, being baſtards, were ſettled at *N.* where they were born; this the ſeſſions refuſed to admit, and now by the court the order of ſeſſions muſt be confirmed; for the marriage is eſtabliſhed by the firſt order, the ſettlement of the children follows from it, and cannot be impeached without entering into the merit of the firſt order, which, not having been appealed from, is concluſive. *Rex* v. *Woodcheſter*, *Burr.* S. C. 191. *Stra.* 1172.

2. So where there is an order of removal unappealed from, and a ſecond original order was made at the end of four months, removing the paupers back again to the pariſh whence they were firſt removed. The court quaſhed it, for the firſt order unappealed from is concluſive, unleſs ſome ſubſequent ſettlement appears, and four months is not a ſufficient time to preſume one. *Sutton St. Nicholas* and *Leverington*, *Burr*, S. C. *Godalming* and *St. Nicholas*, *Wincheſter*. *Ib.* *Rex* v. *Silcheſter*, S. P. *Burr.* S. C. 551.

3. But

3. But where a parish has served notice of appeal against an order of removal, and the other side consent to take back the paupers without giving the appellants the trouble of prosecuting their appeal, this order is not conclusive as being unappealed from; for a party may give up a judgment intended for his own benefit. *Rex* v. *Llanrhyd*, *Burr. Sess. Cas.* 658.

4. Husband and wife are removed by an order, but not any of their children, and the order is not appealed against. It is not conclusive of the settlement of a son married at the time, and living in an house separate from his father. *Rex* v. *Southowram*, 1 *Term Rep.* 353.

5. Order removes a servant from the parish of *G.* *to her master in C.* She is sent back again by another order to *G.* The second is good, though made before an appeal from the first; for as it only sent her to her master, and not to the parish, they may well stand together. *Rex* v. *Gravesend*, *Com.* 97.

(H) Orders not appealed from to the next Sessions. The Effect thereof. 18 Vin. 467.

1. A Pauper in service at *A.*, under an hiring for a year, was taken upon a charge of bastardy and removed to *B.* He does not appeal, but returns in a few days to his master at *A.*, is received by him, serves out the year, and is paid his full wages, yet he gains no settlement at *A.*, for he is concluded by the order not being appealed from, which puts an end to the contract of service. *Rex* v. *Kenilworth*, 2 *Term Rep.* 599.

2. The order of removal was directed to the *parish* of *Kirkby Stephen*, which consisted of ten townships, maintaining their poor separately, and having separate overseers. The pauper, with the order, was delivered to the overseer of the TOWNSHIP of *Kirkby Stephen*, which did not appeal against it, and held to be concluded thereby. *Rex* v. *Kirkby Stephen*, *Burr. Sess. Cas.* 664. 2 *Bott* by *Const*, 799. *pl.* 748.

(K) Orders of Removal repealed, and the Effect thereof. 18 Vin. 470.

1. *REX* v *Bradenham*. An order of sessions, discharging one made by two justices, is conclusive between the parties. *Burr. Sess. Cas.* 394. *Say*, 285. *Vid. Bedingham* and *Kingston Bowsey*, 18 *Vin.* 470. *pl.* 2. S. P.

2. A person is removed by an order of two justices from *D.* to *O.*, which is discharged on appeal. By a second order, he is sent from *D.* to *O.* as a certificate man; and on appeal, it was stated that the first order was before and the second after he became chargeable; the court were of opinion on this special matter, that the first removal was premature. The consequence of which or-

der only was, that he must be suffered to remain until he is chargeable, and not to make a premature order final. *Osgathorpe* and *Disewerth*, *Stra.* 1257.

3. Order of removal to *C.* reversed on appeal; a third parish is not concluded by it, but may remove the pauper to *C.* *Rex* v. *Cirencester*, *Burr. Sess. Cas.* 17.

4. So where a pauper was removed to *S.* and the order of removal quashed, and afterwards he was removed to *B.*, it is competent to *B.* to offer evidence on appeal, that the pauper had gained a settlement in *S.* subsequent to that which the parish acknowledged he had in *B.* *Rex* v. *Bentley*, *Burr. Sess. Cas.* 425.

28 Vin 471.

(L) Orders of Removal. Directed to whom.

TWO justices remove *T. G.* from the hamlet of *Bolehole* to the parish of *Tamworth*, adjudging his settlement to be at *Sisecote* in that parish, and ordering the overseers to receive him, and he was delivered to the churchwardens. The pauper had gained a settlement by service at *Sisecote*, which was an hamlet consisting of an house and three or four hundred acres of land which had never been assessed to the poor rate of the parish, nor had overseers appointed for it, but was assessed to the support of the church. This order is well directed, for by Lord *Mansfield*, this is no township or vill where officers are appointed. There are no overseers or separate œconomy. The justices could not remove to *S.*; the adjudication is to it as part of the parish of *Tamworth*, *Rex* v. *Tamworth*, *Cald.* 28.

Disobeying an Order of Removal.

1. BY 3 *W.* 3. *c.* 11. there is a penalty of 5*l.* inflicted on the churchwardens or overseers not receiving a person sent by a warrant of removal.

2. Indictment for refusing to receive a pauper sent by order of two justices to the liberty of the tower. Verdict against the defendant. It was moved in arrest of judgment, that the 3 *W.* 3. *c.* 11. having prescribed another mode of punishment, it should be pursued. *Sed per cur.* This was an offence before that act. He might have been indicted on 13 & 14 *C.* 2. *c.* 12. or what would have become of the pauper, in case of disobedience, between the passing of those acts. But the 3 *W.* 3. *c.* 11. does not relate to removals from parish, but from county to county. So there is no remedy but by indictment. *Rex* v. *Davies et al. Bott*, 76. *pl.* 113. 3 *Burn's Just.* 579.

3. If a person removed returns of his own accord, without a certificate, by 13 & 14 *Car.* 2. and also by 17 *Geo.* 2. *c.* 5. he is to be sent to the house of correction.

4. The

4. The juſtices held a petty ſeſſions to ſearch for vagrants, and a poor man, reſiding in *B.*, confeſſed himſelf ſettled in *S.*, whereupon the juſtices ordered him to be removed there. On his return, without a certificate, one of the juſtices, who had been preſent at the petty ſeſſions, did, without any ſummons or oath made of his return, commit him to the houſe of correction. On a motion for an information againſt him, the court allowed the conduct of the ſeſſions to be irregular, as no complaint was made of his being or being likely to be chargeable to *B.*, and they were inclined to grant an information againſt the juſtice who ſent him to the houſe of correction, having convicted him unheard. But they permitted it to be compromiſed. *Rex* v. *Angell, Caſes Temp. Hardwick*, 116.

5. The pauper and his wife were removed from *M.* to *B.*, and afterwards both of them returned without a certificate; the defendant, being a juſtice of the county, on complaint made, iſſued his warrant to bring them before him, and the facts being proved, committed them to the houſe of correction *until they ſhould be diſcharged by due courſe of law.* Two queſtions were raiſed. 1ſt. Whether there ought to have been a previous conviction for vagrancy? 2d. Whether the wife could be convicted of vagrancy, or be liable to be ſent to the houſe of correction for returning without a certificate, as ſhe only accompanied her huſband. But the court ſaid, that theſe points were out of the preſent caſe, the warrant being bad in *committing till diſcharged by due courſe of law*; for, if made on 13 & 14 *C.* 2. it ſhould have been to the houſe of correction, *there to be puniſhed as a vagabond*, or to the public workhouſe, *there to be employed in work and labour*; if on 17 *G.* 2. *c.* 5. it ſhould be to the houſe of correction, *there to be kept to hard labour for any time not exceeding a month*; but this is an indefinite commitment, and therefore illegal. *Baldwin et Ux.* v. *Blackmore*, 1 *Burr.* 595.

6. If a pauper be removed by an order, which is not appealed from, it is a crime for him to return to the pariſh from whence he is removed, and he may be indicted for it; and if he be, it is no defence for him that he returned to complete a contract of hiring with a maſter from whoſe ſervice he had been removed. *Per Buller* J. *Rex* v. *Kenilworth*, 2 *Term Rep.* 600.

7. A conviction of a man for returning after removal, quaſhed, for want of ſtating to what pariſh he returned. *Rex* v. *Cleſe-Cole, Mich.* 12 *G.* 3. 2 *Bott* by *Conſt*, 795. *pl.* 741.

8. Although the order of removal be unappealed from, the pauper may return to the ſame pariſh, provided he does not return in a ſtate of vagrancy. *Rex* v. *Fellongley*, 2 *Term Rep.* 709.

Orders of Removal of a *certificate Perſon.* Good or not. As to the Form and Manner in general.

1. ORDER for removing a certificate perſon, not ſetting forth that it was allowed by two juſtices, but adjudging the pariſh which granted the certificate to be the place of the laſt legal ſettlement, is good. *Rex* v. *Newton*, 1 *Seſſ. Caſ.* 149.

2. In the order it was not ſtated that the certificate was *atteſted*, but only that it was *allowed*. *Per cur.* It is good, for the atteſtation is by the ſtatute made previous to the allowance, and therefore when they ſay it was allowed according to the act, we muſt intend that it was atteſted, for otherwiſe it could not be ſo allowed. *Barley Croft and Cole-overton*, *Stra.* 402.

3. In an order of removal of a certificate perſon, it was not ſtated to be made on complaint of the churchwardens and overſeers; nor was there any adjudication that he is actually become chargeable. On appeal, the ſeſſions, in purſuance of the 5 *G.* 2., amend the order in theſe particulars, as matters of form only, *Sed per cur.* Theſe amendments might be the real merits on which the caſe depended; it would be a detrimental conſtruction, and would be giving the ſeſſions an original juriſdiction to take the act ſo largely. *Rex* v. *Great Bedwin*, *Burr. Seſſ. Caſ.* 163. *Stra.* 1158. 2 *Seſſ. Caſ.* 142.

4. Dr. *Burn* is of opinion, that it is not neceſſary in the order to take any notice of the certificate, or to make any uſe of it, except as evidence of the ſettlement; that it is therefore better to omit it, ſince a miſrecital will be fatal. But where perſons are only likely to be chargeable, it is requiſite to ſet forth in the order that they have no certificate. 3 *Burn's Juſt.* 586. ed. 16.

(M) *Expences* allowed. What.

13 Vin. 472.

1. A *Mandamus* was granted to the juſtices of *Nottingham*, commanding them to allow the expence and charges the officers of the appellant pariſh had been put to in keeping a poor perſon from the time of his removal till the order was diſcharged by the ſeſſions on appeal. *St. Mary's Nottingham and Kirklington*, 2 *Seſſ. Caſ.* 67.

2. An order of ſeſſions, that the coſts of maintenance ſhall abide the event of the cauſe, in caſe another order of removal ſhall be made, the firſt being quaſhed for inſufficiency, was quaſhed in *B. R.*; for the juſtices muſt either give or not give coſts at the time of making the order. *Rex* v. *Great Chart*, *Burr. Seſſ. Caſ.* 194.

Repleader. [G]

(A) In what Caſes it ſhall be (and at what Time). 18 Vin. 567.

1. WHERE the iſſue is immaterial, the court will award a repleader; reſpecting which the following rules are laid down by the court in the caſe of *Staple* v. *Haydon*, 2 *Salk.* 569. 2 *Ld. Raym.* 922. Firſt, that at common law a repleader was allowed before trial, becauſe a verdict did not cure an immaterial iſſue; but now a repleader ought never to be allowed till trial, becauſe the fault of the iſſue may be helped after verdict by the ſtatute of jeofails. Secondly, that if a repleader be denied where it ſhould be granted, or granted where it ſhould be denied, it is error. Thirdly, that the judgment of repleader is that *the parties ſhould replead*; and the parties muſt begin at the firſt fault which occaſioned the immaterial iſſue. 1 *Ld. Raym.* 169. Thus, if the declaration is ill, and the plea and replication are alſo ill, the parties muſt begin *de novo*, but if the plea is good and the replication ill, then, at the replication. Fourthly, no coſts are allowed on either ſide. Fifthly, that a repleader cannot be awarded after a default at *niſi prius*. To which it may be added, that a repleader cannot be awarded after a demurrer, or writ of error, but only after iſſue joined; and it is not grantable in favour of the perſon who made the firſt fault in pleading. *Tidd's Pr. K. B.* 824.

2. When the finding on an iſſue does not determine the right, the court ought to award a repleader, unleſs it appears from the record, that by no manner of pleading the matter could avail. *Rex* v. *Phillips*, 1 *Burr.* 292. See alſo *Cowp.* 510.

3. After inqueſt is taken by default, defendant cannot be received to make ſuggeſtion at the trial, for after default, there can be no repleader. *Brampton* v. *Crabb*, 1 *Stra.* 46.

4. If plaintiff declares in a leaſe to *A.*, which he ſays is come by aſſignment to defendant, and he pleads that *A.* did not aſſign to him, and iſſue is joined, there ſhall be a repleader; for it is an immaterial iſſue. *Enys* v. *Mohun*, 2 *Stra.* 847.

It appears by the report in Barnadiſton, that this was a motion in arreſt of judgment, a verdict being found for the plaintiff. But that it is a rule never to grant a repleader, where the iſſue is found againſt the party tendering it. Per Buller, in Webſter v. Banniſter, Dougl. 396.

5. Or if a bond is conditioned for payment of money, on or before the 5th of *December*, and defendant pleads payment on 5th *December*, and plaintiff replies; and verdict for plaintiff, for it is an immaterial iſſue. *Tyron* v. *Carter*, 2 *Stra.* 994.

6. The

6. The replication, as ſtated in *Bull. N. P.* 162. was, "that the money was not paid on that day," which was ill, for the defendant having pleaded a ſtrict performance, and not a collateral matter, the replication ought to ſhew a breach, that it may appear to the court to be in ſuch part of the award as is good, not only to have met the defendant's plea, but to have ſhewn that the money was not paid at all. *Vide* 2 *Burr.* 944. 1 *Black.* 210. S. C. 2 *Wilſ.* 173.

[G]

Replevin.

18 Vin. 577.

(A) Replevin. Of what Things a Replevin lies.

1. WHETHER goods, taken under a warrant of diſtreſs granted by commiſſioners of ſewers, may not be replevied while in the hands of the officer? *Qu.* *Pritchard* v. *Stephens*, 6 *Term Rep.* 522.

2. Goods ſeized in conſequence of any judgment or adjudication of courts, or perſons having juriſdiction, are not repleviſable.

3. The court ordered an attachment *niſi* againſt the town clerk of *Guildford*, and a defendant convicted on the game act, for granting and ſuing out a replevin of goods diſtrained for the penalty. But on ſhewing cauſe the next term, when *Eyre* J. only was preſent, he diſcharged the rule, becauſe it was only a contempt to the inferior juriſdiction of the juſtices, and in that caſe *B. R.* never interpoſes. *Rex* v. *Burchett*, 1 *Stra.* 567.

4. The court granted an attachment againſt the under-ſheriff of *Cumberland*, for granting a replevin of goods diſtrained on a conviction for dear-ſtealing. *Rex* v. *Monkhouſe*, 2 *Stra.* 1184. *Nolan's* ed.

The ſheriff was adviſed, and had expreſs notice before he granted the replevin, that the goods were irrepleviſable; and the ground of the deciſion was, that the conviction was concluſive, and its legality could not be queſtioned in a replevin.

5. Replevin does not lie for goods diſtrained for a fine impoſed on an officer by commiſſioners of land tax, and if he takes out replevin it is a contempt, and an attachment will be granted. *Rex* v. *Oliver*, *Tr.* 1717. *Bunb.* 14.

6. Goods taken under a diſtreſs for a penalty on a conviction under an act of parliament, cannot be replevied; *ſemb.* *Pearſon* v. *Roberts*. *Willes*, 672.

(E) How it ſhall be brought. Writ and Declaration.

18 Vin. 579.

1. IF *A.* brings *homine replegiando* for his wife, then *alias*, then *pluries*, to which defendant appears, and then *capias in withernam* iſſues, it is irregular, and proceſs thereon ſhall be ſtaid. *Saunders* v. *Forteſcue*, 1 *Wilſ.* 256.

2. If, after defendant's appearance, and before declaration, the wife dies, the court will not on motion ſtay proceedings, but plaintiff ſhall declare, and defendant take what advantage he can by pleading. *Ibid.*

3. Defendent may be bailed on *capias in withernam*, but plaintiff muſt firſt declare, and defendant plead *non cepit*; and the bail is for defendant to appear, and if judgment againſt him, to render his body, and be in cuſtody till he render the perſon, *&c.* *Barnes*, 59.

4. The action on the caſe againſt the ſheriff for taking inſufficient pledges in replevin, ought to be brought by the perſon making cognizance, where there is no avowant on the record. *Page* v. *Eamer*, 1 *Boſ. & Pul.* 378.

5. The declaration ought to be certain in ſetting forth the number and kinds of cattle diſtrained; becauſe otherwiſe the ſheriff cannot tell how to make deliverance, if it ſhould be neceſſary. *Vide Bourne* v. *Mattaire*, 2 *Stra.* 1015.

6. A declaration in replevin is bad, if it do not ſpecify the place where the goods were taken; but if the defendant do not demur, but plead to it, the defect is cured. *Willes*, 475.

7. The *taking* need not be laid in the place where the original taking was; any other taking where the cattle were in defendant's cuſtody is good. *Walton* v. *Kerſop*, 2 *Wilſ.* 354.

8. If plaintiff dies after declaration, and before avowry, there can be no writ *de retorno habendo*, but defendant may diſtrain again. *Culfield* v. *Corney*, 2 *Wilſ.* 83.

9. The defendant *cepit in alio loco*, and avowed taking the goods in the place in queſtion, whither they had been fraudulently conveyed within 30 days, *&c.* from the demiſed premiſes on a diſtreſs for rent; the plaintiff in his plea in bar traverſed the avowry, and took no notice of the plea; which was held ill on demurrer, the avowry being in the nature of a ſuggeſtion to entitle the party to a return of the diſtreſs, and not traverſable. *Bullythorpe* v. *Turner*, *C. P. Willes*, 475.

(A. a) Pleadings.

19 Vin. 21.

1. WHERE defendant avows at a different place to have a return, he muſt traverſe the place in the court; but when he does not inſiſt on a return, he may plead *non cepit*, and prove the taking at another place. *Johnſon* v. *Wallyer*, 1 *Stra.* 507.

2. Defen-

2. Defendant may have leave to withdraw his avowry, and plead property in a ſtranger. *Barnes*, 348.

3. An avowry for an increaſed rent under a demiſe, for every acre of land which ſhould be converted into tillage, is ſupported by the evidence of a leaſe for a term of years, with a covenant to pay the increaſed rent for every acre which ſhould be ſo converted during *a part of the term* (*ex. gr.* for the laſt three years) under this ſtatute. *Roulſtone* v. *Clarke*, 2 *H. Bl.* 563.

4. In replevin, the defendant avowed, &c. and ſtated in his avowry, that by leaſe and releaſe, he, in conſideration of an annuity therein mentioned, conveyed certain premiſes, containing the place where, &c. to the plaintiff in fee, ſubject to a rent charge, payable to the defendant during her life, with power of diſtreſs for non-payment of the annuity; and that by virtue of the leaſe and releaſe, and by force of the ſtatute, &c. the plaintiff became ſeiſed in fee, &c. and then ſhe juſtified, &c. as a diſtreſs for non-payment of the annuity. Pleas in bar. 1ſt. That the plaintiff never was ſeiſed, &c. in fee. 2dly. (admitting that the defendant did, by the leaſe, bargain and ſell, &c. to the plaintiff for a year) That, at the time of making the bargain and ſale, the defendant was ſeiſed, &c. only for her life, the reverſion in fee then belonging to another, traverſing that the defendant was ſeiſed of the reverſion in fee. On demurrer, both pleas were holden bad; the firſt, becauſe it denied what was before admitted, and becauſe it traverſed only a conſequence of law; the ſecond, becauſe it admitted that the defendant had an eſtate ſufficient to juſtify the diſtreſs. *Grillo* v. *Manuell*.

5. The plea *de injuria ſua propria abſque tali cauſa*, to take cognizance for rent in arrear, is bad, upon ſpecial demurrer. *Jones* v. *Kitchen*, 1 *Boſ.* & *Pul.* 76.

6. Pleading that *A. having been* lawfully poſſeſſed, &c. *as* tenant at will to *B.* is a ſufficient averment that *A.* was tenant at will. *Eaton* v. *Southby*, *Willes*, 131.

7. In bar to an avowry for rent, pleading that corn, which had been cut, was left on the ground until it was fit, in a courſe of huſbandry, to be carried, is ſufficient; without ſaying how long it remained there, the reaſonableneſs of the time being a queſtion of fact for the jury, and not a queſtion of law for the court. *Ibid.*

8. A defendant in replevin is entitled to an aſſignment of the replevin bond, if the plaintiff in replevin do not appear in the county court, and proſecute according to the condition. *Dias* v. *Freeman*, 5 *Term Rep.* 195.

9. And he may ſue on the bond, as aſſignee of the ſheriff, in the ſuperior courts, though the replevin be not removed out of the county court. *Ibid.*

10. On avowry for rent and iſſue thereon, plaintiff cannot give evidence to ſet off a mutual debt; but, by way of ſpecial plea to avowry, he may plead mutual debt of more than the rent. *Barnes*, 450.

11. To

11. To an avowry for rent, the tenant may plead the payment of a ground-rent to the original landlord. *Sapsford* v. *Fletcher*, 4 *Term Rep.* 511.

12. *Cepit in alio loco* is a plea in bar, not in abatement; though it pray *judgment of the declaration*; no affidavit is neceſſary, nor need it be pleaded in four days after declaration delivered. *Barnes*, 353.

13. A defendant in replevin is not entitled to move for judgment, as in the caſe of a nonſuit under ſtat. 14 *G.* 2. *c.* 17. *ſ.* 1. *Shortridge* v. *Niern*, 5 *Term Rep.* 400.

14. A judgment in replevin, "that the defendants have a re-"turn of the cattle, and recover their damages and coſts aſſeſſed "by the jury," *&c.* is good, either as a judgment at common law, though the return be not judged irrepleviſable, or as a judgment under ſtat. 21 *Hen.* 8. *c.* 19. which entitles the defendant to damages and coſts. *Gammon* v. *Jones* (in error), 4 *Term Rep.* 509.

15. The condition of a replevin-bond is not ſatisfied by a proſecution of the ſuit in the county court; but if removed by *re. fa. lo.* into a ſuperior court, it muſt be proſecuted there with effect, and a return made, if adjudged there. *Gwillim* v. *Holbrooke*, 1 *Boſ. & Pul.* 410.

16. In replevin receipt of rent is title, and a party, who comes in as tenant with notice that a certain perſon is not his landlord, cannot conteſt his title in replevin. *Johnſon* v. *Maſon*, 1 *Eſp. Rep. N. P.* 91.

17. In an action on the caſe againſt the ſheriff for taking inſufficient *pledges* in replevin, he is liable to the extent of *double the value* of the goods diſtrained, but no further. *Evans* v. *Brander*, 2 *H. Bl.* 547.

18. It not appearing in a declaration, by the aſſignee of a replevin-bond, that the plaintiff was the avowant or perſon making cognizance, the court of themſelves referred to the replevin ſuit, it being of record in this court, and the declaration concluding *prout patet per recordum*. *Barker* v. *Horton*, *Willes*, 460.

Replication and Rejoinder.

(N) In Chancery.

19 Vin. 43.

1. IF the plaintiff replies to a plea, he thereby admits it to be good, if it be true, and the validity of it can never afterwards be conſidered, but only the truth of it. *Rec. Ch.* 58. 1695. *Parker* v. *Blythemore*. 3 *P. Wms.* 94. 1730. *Harris* v. *Ingledew*.

2. If

2. If a defendant puts in an anſwer to a bill brought by an infant, who does not reply to it, ſuch anſwer muſt, it ſeems, be taken to be true; in regard the defendant, for want of a replication, is deprived of an opportunity of examining witneſſes to prove his anſwer. 3 *P. Wms.* 237. Note. *Quære.*

3. The court will not give leave to withdraw a replication, unleſs it is added that the plaintiff may thereby be enabled to amend his bill; or otherwiſe it may be a contrivance to defeat the defendant of his full coſts, by getting the bill diſmiſſed at the hearing with 40*s.* coſts. 3 *Atk.* 565. 1747. *Pott and others* v. *Reynolds.*

4. If the defendant diſclaims generally, and the plaintiff replies to his anſwer, and ſerves him with a ſubpœna to rejoin, he is entitled to have coſts againſt him for the vexation. 3 *Atk.* 582. 1746. *Williams* v. *Longfellow.*

Report.

19 Vin. 44.

(A) By Maſter in Chancery.

1. UPON exceptions to the maſter's report, affidavits made ſubſequent to it cannot be read, notwithſtanding the affidavits of the adverſe party were filed but the evening before the report. 2 *Atk.* 21. 1739. *Davis* v. *Davis.*

2. A bill referred for impertinence; the maſter reports it pertinent; the defendant excepts generally, without ſpecifying the parts of the bill which are impertinent, which was held regular. 2 *Atk.* 182. 1741. *Mackworth* v. *Briggs.*

3. Where the error in the maſter's report is owing to the party's not laying a material piece of evidence before him, the court will not direct him to review his report, but upon the exceptant's giving up his depoſit. 2 *Atk.* 408. 1742. *Hodges* v. *Cardonnel.*

4. The court will not determine matters in a ſummary way upon motion, which have been reſerved till after the maſter has made his report. 3 *Atk.* 689. 1748. *Cooke* v. *Gwyn and others.*

5. Exceptions will not lie to a maſter's report of maintenance. 1 *Br. Ch. Rep.* 577. 1784. *Ex parte Nicholls.* Nor to the maſter's report of a receiver. 3 *Bro. Ch. Rep.* 508. 1792. *Thomas* v. *Dawkins.* 3 *Veſ. jun.* 388. 1798. *Wilkins* v. *Williams.* S. P.

For more of *Report* in general, ſee the ſeveral Books of Practice in the Courts of Equity, and other proper titles.

Reſcous. [G]

(D) In criminal Caſes.

19 Vin. 97.

1. BY ſtat. 25 *G.* 2. *c.* 37. *ſ.* 9. "If any perſon ſhall reſcue or attempt to reſcue any perſon out of priſon, committed for or found guilty of *murder*, or reſcue, or attempt to reſcue any perſon convicted of murder going to execution, or during execution, every ſuch offender ſhall be deemed guilty of felony, and ſuffer death without benefit of clergy." And by the ſame ſtatute, *ſ.* 10. an attempt to reſcue the body after execution, out of the hands of the ſheriff, or houſe of the ſurgeon, is made felony, and ſubjects the party to tranſportation for ſeven years.

2. By ſeveral ſpecial ſtatutes, to reſcue or attempt to reſcue any perſon, committed for the offences enumerated in thoſe, is felony without benefit of clergy. *Vide* ſtatutes 6 *Geo.* 1. *c.* 23. *ſ.* 5. 24 *Geo.* 3. *c.* 56. as to tranſportation; ſtatutes 9 *Geo.* 1. *c.* 22. and 27 *Geo.* 2. *c.* 15. as to offences againſt the black act; ſtatute 8 *Geo.* 2. *c.* 20. as to deſtroying turnpikes. See alſo ſtatutes 11 *Geo.* 2. *c.* 26. and 24 *Geo.* 2. *c.* 40. *ſ.* 28. againſt perſons aſſembling to the number of *five* or more, to reſcue any unlawful retailers of ſpirituous liquors, or to aſſiſt the informers againſt them.

(F) Proceſs, Proceedings, and Pleadings.

1. IN caſe for reſcuing a debtor taken upon meſne proceſs, ſued out of the palace court, it was holden not to be ſufficient ground for arreſting the judgment after verdict, that it was not alleged that the cauſe of action in the inferior court aroſe within the juriſdiction, or that it was not alleged that the party below did not appear at the return of the writ. *Bentley* v. *Donnelly*, 8 *Term Rep.* 127.

2. A diſtinction was taken where an attachment is prayed for a reſcous in the firſt inſtance, and where a rule to ſhew cauſe is only aſked; in this caſe, the affidavits of the facts are ſufficient; in the other caſe, the ſheriff's return is requiſite. *Trin.* 5 *Geo.* 2. *B. R. Young* v. *Payne.*

3. In an indictment for a reſcue from the houſe of correction, it muſt appear for what the priſoner was committed there. *Rex* v. *Freeman*, 2 *Stra.* 1226.

4. If it appear on the return, that the warrant was to two, and the arreſt by one only, yet the return is good; for it is no exception in what relates to public juſtice. *Rex* v. *Roe*, 1 *Stra.* 117.

5. A return made by the ſheriff, that the perſon arreſted was reſcued out of the hands of the *bailiff*, is bad; it ought to be out of his own cuſtody. 2 *Term Rep.* 155.

6. Return of a reſcous is not traverſable, and the reſcuer muſt be brought into court to be fined. *Barnes*, 429.

7. The reſcuer taken may be admitted to give recognizance to try the falſe return againſt ſheriff. *Ibid.* 430.

8. The ſheriff's return of a reſcue is of itſelf a conviction of a reſcue, and proceſs immediately iſſues from the crown office againſt the reſcuer. *Rex* v. *Pember*, 1 *Burr.* 112.

9. *C. B.* grants attachment againſt the reſcuer on affidavit, always; *B. R.* ſometimes, but inclines to require a return. *Young* v. *Paine*, 1 *Stra.* 531.

10. The exchequer will, on return, make the attachment abſolute at firſt. *Williams* v. *Evans*, *Bunb.* 181.

11. The attachment muſt be returnable at a general return. *Rex* v. *Wilkins*, 1 *Stra.* 624.

12. On *guilty of a reſcue* returned, but in no other caſe of contempt, the offender ſhall be puniſhed without being examined on interrogatories; for the return muſt not be traverſed. *Rex* v. *Elkins*, 4 *Burr.* 2129.

Reſidence.

19 Vin. 142. ## (A) Non-Reſidence. What is; and how puniſhable.

1. THE defendant, rector of *B.* in which there is a good parſonage houſe, reſided in another houſe of his own within the pariſh; he was alſo archdeacon of the diſtrict in which the whole pariſh lay; there was no archdeaconal houſe: and is was held, that this was non-reſidence within the ſtatute 21 *H.* 8. For there being no archdeaconal houſe, he ought to have reſided at the parſonage; and his own houſe, although within the archdeaconry, is not a reſidence there. *Law* v. *Ibbetſon*, 5 *Burr.* 2723.

2. Where there was no parſonage houſe, and therefore the parſon abſented himſelf entirely, and did not reſide in the pariſh at all; it was held that he muſt reſide ſomewhere within the pariſh. *Wilkinſon* v. *Allott*, *Cowp.* 429.

3. A ſequeſtration of a benefice, with cure of ſouls upon a *fieri facias*, is no excuſe for the non-reſidence of the incumbent; and therefore a leaſe thereof made by him is avoided by ſuch non-

reſidence

reſidence by the ſtatute 13 *Eliz. c.* 20. *Doe dem. Rogers* v. *Mears*, *Cowp.* 129.

4. A curate of a chapelry, augmented by Queen *Anne*'s bounty, was held not to be liable to the penalties of the 21 *H.* 8. *c.* 13. for non-reſidence. *Jenkinſon* v. *Thomas*, 4 *Term Rep.* 665.

Riots. [G]

(C) Statutes. And Power of the Juſtices. 19 Vin. 237.

IF the rioters are above the number of twelve, the power of one juſtice is very much enlarged by the act, (commonly called the riot act, 1 *G.* 2. *c.* 5. which is required to be read at every quarter ſeſſions and leet. By this act, on the tumultuous aſſembly of perſons to the number of twelve or more, every juſtice, ſheriff, or under-ſheriff, and mayor ſhall, on notice thereof, reſort to the place, and read the proclamation therein particularly preſcribed; and any perſon making ſuch oppoſition to the reading thereof, that it be not made, is made guilty of felony without benefit of clergy. And by *ſ.* 5. if any twelve or more ſhall continue together by the ſpace of one hour after ſuch proclamation made, or after ſuch hindrance (having knowledge thereof), they ſhall be guilty of felony without benefit of clergy.

(D) Informations and Indictments. Good or not.

1. THE hundred are not liable in an action for damages brought by the perſon injured by a mob beginning to pull down his houſe, *&c.* unleſs the riot be of ſuch a kind as to amount to felony within the ſtatute 1 *G.* 1. *c.* 5. *Reed* v. *Clarke et al.* 7 *Term Rep.* 496. In this caſe, the breaking of the plaintiff's windows by a mob, becauſe he would not illuminate his houſe on a particular occaſion, was held not to be within the act.

2. If a mob riotouſly and by force demoliſh a gaol, by which the debtors eſcape, the ſheriff or gaoler is anſwerable in an action on the caſe to the creditors for their eſcape. *Elliott* v. *The Duke of Norfolk*, 4 *Term Rep.* 789.

(E) Proceedings, Pleadings, and Verdict.

1. AN order of juſtices for the levying of money upon the inhabitants of an hundred under the riot act, directing that the money, when levied, ſhall be paid into the hands of a

banker, ſubject to their further order, is bad. *Rex* v. *The Inhabitants of the Hundred of Halfshire*, 5 *Term Rep.* 341. The money ſhould be directed to be paid to the party entitled.

2. A writ of execution, ſued out by the party who has recovered damages againſt the hundred, and delivered by the ſheriff to the juſtices, is a good foundation for an order to levy the amount. *Semb. Ibid.*

3. The order for levying the damages ought to be upon the inhabitants of the "towns, pariſhes, villages, and hamlets," purſuant to ſtat. 27 *Eliz. c.* 13. and not upon the inhabitants of the "diſtricts and pariſhes" within the hundred. *Ibid.*

4. If ſix perſons are indicted, two of them die untried, two found not guilty and two found guilty, it is good; for it ſhall be ſuppoſed it was committed by thoſe who have not been tried, and judgment ſhall not be arreſted. *Rex* v. *Scott*, 3 *Burr.* 1262.

5. To ſupport an action againſt the hundred for damages on ſtat. 1 *G.* 1. *ſ.* 2. *c.* 5. for the riotous demolition of a houſe, it is not neceſſary to prove that twelve rioters were aſſembled at a time. *Pritchett* v. *Waldron*, 5 *Term Rep.* 14. Such an action is maintainable by a truſtee. in whom the legal eſtate is veſted for exiſting purpoſes, and (as it ſeems) even by a bare truſtee of a ſatisfied term. *Ibid.*

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19 Vin. 244.

Rivers.

1. A Plea, inſiſting on the right to tow on the banks of public navigable rivers as a common law right, was held bad. *Ball* v. *Herbert*, 3 *Term Rep.* 253.

2. In an arm of the ſea, or public navigable river, a ſubject was allowed to preſcribe for an excluſive right of fiſhery; the judgment was afterwards reverſed in the Exchequer Chamber upon matter of form in the pleadings. *Mayor of Orford* v. *Richardſon*, 4 *Term Rep.* 437.

Robbery. [G]

(B) What is or amounts to a Robbery, in reſpect of the *Manner*, *or Perſon from whom*. 19 Vin. 245.

1. THE crime of robbery is complete the moment the property is *taken*; and therefore the immediate re-delivery of it by the robber will not purge the offence. *Peat*'s caſe. *Leach's Cr. Caſ.* 266.

2. If *A.*, *B.*, *C.*, and *D.*, in order to get the reward, agree that *E.* ſhall procure a perſon to rob *D.*, and *E.* procures *F.*, and they two take money and goods from *D.*, it is not a robbery; for it cannot be ſaid they were taken againſt his will. *M'Daniel*'s caſe. 1755. *Foſter*, 121.

3. Yet if *A.* in order to apprehend a highwayman, goes out in a chaiſe, and when the highwayman comes up, and demands his money, gives it him, and then ſeizes it upon him, it is a robbery. *Nordon*'s caſe. *Foſter*, 129.

4. To obtain money from a perſon and againſt his will, by threatening to accuſe him of unnatural practices, amounts to the crime of robbery. *Donnelly*'s caſe. 2 *Leach's Cr. Caſ.* 229. But if the property be not taken by violence, nor parted with through fear, it is no robbery, though there were ſufficient legal and reaſonable ground for fear, as upon a threat to charge one with an unnatural crime. *Reane*'s caſe, 2 *Eaſt's Pleas of the Crown*, 734.

5. Taking in the preſence is taking from the perſon; but in a ſpecial verdict it muſt be *expreſsly* found that the party in the robbery was preſent at the taking, otherwiſe it is only grand larceny. *Rex* v. *Francis*, 2 *Stra.* 1015.

6. In *Plunket Horner*'s caſe, *O. B. Jan.* 1790, *cor. Buller* J. and *Thomſon* B., where the property, an umbrella, was ſuddenly ſnatched out of the hand of the proſecutrix as ſhe was walking along the ſtreet; the court ſaid, that it had been ruled there about 80 years before by very high authority, that the ſnatching away from a perſon unawares conſtituted a robbery: but the law was now ſettled, that unleſs there was ſome ſtruggle to keep it, and it were forced from the hand of the owner, it was not ſo. The ſame diſtinction had been taken before in *Chick*'s caſe, *O. B. Dec.* 1781. 2 *Eaſt's Pleas of the Crown*, 703. See alſo *Baker*'s caſe. *Leach's Cr. Caſ.* 324.

7. If a bailiff handcuff a priſoner, under pretence of carrying him to priſon with greater ſafety, and by means of ſuch violence

extort money from him, he is guilty of robbery. *Gaſcoyne*'s caſe, 1 *Leach's Cr. Caſ.* 313.

8. To ſnatch a lady's ear-ring from her ear, ſo that the ear is thereby torn through, is ſuch a taking by violence as will conſtitute the crime of robbery; and although the intent be not completely accompliſhed, but the ear-ring is found lodged among the curls of the hair, yet there is a ſufficient *aſportation* to complete the offence. *Lapier*'s caſe, *Leach's Cr. Caſ.* 360.

9. To obtain from a perſon his note of hand, by threatening with a knife held to his throat to take away his life, is not a felonious taking of a note within the ſtat. 2 *G.* 2. *c.* 25. for it never was of *value* to or in the peaceable poſſeſſion of ſuch perſon. Mr. *Phipoe*'s caſe. 2 *Leach's Cr. Caſ.* 774.

10. To obtain money by means of a threat to ſend for a conſtable to take the party before a magiſtrate, and from thence to priſon, is not a robbery; for the threat of legal impriſonment ought not ſo to alarm any mind as to induce the perſon to part with his property. *Knewland*'s caſe, 2 *Leach's Cr. Caſ.* 833.

11. One *Merriman*, carrying his cheeſes along the highway in a cart, was ſtopped by one *Hall*, who inſiſted on ſeizing them for want of a permit (which was found by the jury to be a mere pretence for the purpoſe of defrauding *Merriman*, no permit being neceſſary), and on ſome altercation they agreed to go before a magiſtrate to determine the matter. In the mean time, other perſons, riotouſly aſſembled on account of the dearneſs of proviſions, and in confederacy with *Hall*, carried away the goods in *Merriman*'s abſence. It was objected to be no robbery, there being no force uſed, but only larceny; but *Hewit* J. over-ruled the objection, and the jury found it robbery; and the jury alſo found a verdict for the plaintiff *Merriman*, in an action againſt the hundred of *Chippenham*, on the ſtatutes of hue and cry; and, upon motion for a new trial in *Mich.* 8 *G.* 3. the court of *K. B.* were clearly of the ſame opinion. 2 *Eaſt's Pl. of the Cr.* 709.

12. Robbery may be conſtituted, although the thing taken were not really within the original contemplation of the robber, nor the object of his purſuit at the time. As where one *Blackham* aſſaulted a woman with intent to commit a rape, and ſhe, without any demand from him, offered him money, which the priſoner took and put into his pocket, but continued to treat her with violence to effect his original purpoſe, till he was interrupted by the approach of another perſon. This was holden to be robbery by a conſiderable majority of the judges; for the woman, from violence and terror, occaſioned by the priſoner's behaviour, and to redeem her chaſtity, offered the money, which it is clear ſhe would not have given voluntarily; and the priſoner, by taking it, derived that advantage to himſelf from his felonious conduct, though his original intent were to commit a rape. 2 *Eaſt's Pl. Cr.* 712.

13. During the riots in *London* in 1780, a boy with a cockade in his hat knocked violently at the door of the proſecutor *Mahon*, who thereupon opened it, and the boy ſaid to him, "God bleſs your honour,

honour, remember the poor mob." *Mahon* told him to go along, on which he ſaid—"Then I will go and fetch my captain." He went, and the mob, to the amount of 100, armed with ſticks and whatever elſe they could get, ſoon after came, headed by the priſoner *Thomas Taplin* on horſeback, having his horſe led by the ſame boy. On their coming up, the byſtanders ſaid—"you muſt give them money," and the boy ſaid "now, I have brought my captain." Some of the mob ſaid "God bleſs this gentleman, he is always generous." *Mahon* then aſked the priſoner, "how much", who anſwered "half a crown, ſir." On which *Mahon*, who had before only intended to give a ſhilling, gave the priſoner the half crown. On which the mob gave three cheers and went to the next houſe. This was holden robbery. 2 *Eaſt's Pl. Cr.* 712.

14. If a perſon, by force or threats, compel another to give him his goods, and by way of colour oblige him to take, or if he offer leſs than the value, this is alſo robbery. As where the priſoner took a buſhel and a half of wheat, worth 8*s.*, and forced the owner to take 13½*d.* for it, threatening to kill her if ſhe refuſed; this was clearly holden to be a robbery by all the judges, upon a conference. *Rex* v. *Symons*, *Cornwall Lent Aſſ.* 1773. *Ibid.* See alſo *Spencer*'s caſe, *Ibid.*

15. The priſoners threatened to bring a mob from *Birmingham* (then in a ſtate of riot and diſturbance), and burn the proſecutor's houſe down, if he did not give them money, which he did under fear of that threat. Held to be *robbery*. *Rex* v. *J. & E. Aſtley*, *Staffordſ Summer Aſſ.* 1793. *Ibid. p.* 729.

(Y) Indictment, and where the Felon ſhall have his Clergy. 19 Vin. 270.

1. IN the caſe of *Summers* and others, who were indicted for a robbery near the highway, and taking 13*l.* from the perſon of *J. H.*, a ſpecial verdict was found, that *J. H.* went to an alehouſe in *Smithfield*, and there was ſet upon and robbed. And all the judges at *Serjeants'-Inn*, on the 25th *May* 1705, held that though the indictment were ſpecial for a robbery *near the highway*, and this in *a houſe* was not ſo; yet as the ſtat. 3 *Will. & M.* took away clergy in all robberies, the priſoners *ſhould not have their clergy*. *Vide* 2 *Eaſt's Pl. Cr.* 785.

2. Again in the caſe of *Durnford* v. *Newton*, at the *O. B. Gould* J., *Hotham* B., and *Buller* J., determined upon the ſame principle, when the robbery was in a houſe in a ſtreet hired by one of the priſoners for the purpoſe, but not inhabited by any one; and the indictment charged the robbery to have been committed in the dwelling-houſe of that priſoner.

3. It is immaterial, in the caſe of robbery, whether the ownerſhip of the houſe be properly deſcribed in the indictment. *John Pye* was convicted upon an indictment which charged him with robbing *Robert Fernyough*, in the barn of *Wilday*. The fact was committed

mitted in a houſe, but it did not appear who was the owner of it. But on reference to the judges in *Eaſter* term 1790, they all held the conviction proper.

4. *Suſannah Johnſtone* was convicted on an indictment for robbing *Richard Dicken* in the dwelling-houſe of *Joſeph Johnſtone*, at *Birmingham*. The robbery was committed by the wife in the huſband's houſe, whoſe chriſtian name could not be proved. But in *Eaſter* term 1793, all the judges held the conviction proper.

Sale.

29 Vin. 274. (A) Sale for Portions decreed upon Settlements, though no Words directing it.

See *Creditors*, *Deviſe*, *Heir*, *Portions*, *Truſt*, and other proper titles.

Satisfaction.

29 Vin. 277. What ſhall be ſaid a Satisfaction, and for what.

1. AN agreement between a debtor and his creditors, that they ſhould accept a compoſition in lieu of their reſpective debts, to be paid in a reaſonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand. If the agreement had been executed, it would have been otherwiſe. *Heathcote* v. *Crookſhanks*, 2 *Term Rep.* 27.

2. A father permitting lands to deſcend in fee, if juſt of the ſame value with lands covenanted to be ſettled in tail, is a ſatisfaction. 3 *P. Wms.* 225. 1733. *Lechmere* v. *Earl Carliſle*.

3. A matter of leſs value cannot be a ſatisfaction of that which is of greater value; neither are lands of much greater value, left to a daughter, a ſatisfaction for a portion. *Ibid.*

4. Three thouſand pounds are covenanted to be laid out in land; the money need not be laid out altogether upon one purchaſe, but if laid out at ſeveral times, it is enough; and if the covenantor dies, having purchaſed ſome lands which are left to deſcend, it is a ſatisfaction *pro tanto*. *Ibid.* 228.

5. In

5. In a ſettlement, a term was raiſed for daughters' portions, *viz.* 10,000*l.* with a proviſo, that if the father, by deed or will, ſhould give or leave the ſum of 10,000*l.* to his ſaid daughters, it ſhould be a ſatisfaction: the father leaves land to the daughters of the value of 10,000*l.*, this is no ſatisfaction. 3 *P. Wms.* 245. 1734. *Chaplin* v. *Chaplin.*

6. Money and land go in different channels, therefore the one cannot be a ſatisfaction for the other. *Ibid.*

7. Huſband on marriage ſettled 100*l. per annum* pin money in truſt for his wife for her ſeparate uſe, which becomes in arrear, and then the huſband by will gives the wife a legacy of 500*l.* after which there is a further arrear of the pin-money, and then the huſband dies; this legacy, being greater than the debt, is a ſatisfaction of the arrears of the pin money due before the making the will. 3 *P. Wms.* 353. 1735. *Fowler* v. *Fowler.*

8. *A.* gives an annuity of 20*l.* to his daughter and the heirs of her body quarterly without any abatement; *B.*, the ſurviving executor of *A.*, gives to the daughter of *A.* and her daughter an annuity of 20*l.* by will, to be paid quarterly without any abatement, out of his freehold houſes in *Holborn;* and if they die without iſſue, then to return to the plaintiff his heir; and by indorſement upon the will with a pencil, ſays, "*I hope the* 20*l. will* "*not be taken for another* 20*l. annuity, but to confirm the* 20*l. annuity* "*her father left her and her daughter.*" The indorſement is of no weight, but on the circumſtances the daughter of *A.* is not entitled to both annuities. 1 *Atk.* 425. 1738. *Heather* v. *Rider.*

9. Five hundred pounds given in a teſtator's lifetime, was held a ſatisfaction for the ſame ſum left by his will. 2 *Atk.* 48. 1740. *Biggleſton* v. *Grubb.*

10. *A.* gave a woman, who cohabited with him, a bond for 2000*l.* and intereſt quarterly during her life, and after her death to her children; but from the date of the bond to the day of his death, which was four years and a half, conſtantly maintained her: Lord *Hardwicke,* Chancellor, declared the maintenance to be in lieu of intereſt. 2 *Atk.* 84. 1740. *Lloyd* v. *Carter.*

11. *W. L.* gave *A. M.* a bond for 300*l.* and intereſt in 1728, and in 1731 paid her 100*l.*; in 1736 he made his will, and gave all his lands in *B.* for a term of 200 years, upon truſt to raiſe and pay within two years after his death to *A. M.* 200*l.*; and alſo deviſed other lands to the ſame truſtee for 300 years on truſt to pay 200*l.* to *A. M.* within one year after his death. The executor of *W. L.* paid ſome part of the bond to *A. M.* in her lifetime: the bill prays that the legacies may be conſidered a ſatisfaction of the bond, and that her executor may refund what ſhe had received in part payment thereof. *The Maſter of the Rolls* conſidered this a contingent legacy, and that therefore it was not a ſatisfaction of the bond. 2 *Atk.* 300. 1742. *Nicholls* v. *Judſon.*

12. Though it be a rule that a legacy greater or as great as the debt ſhall be taken to be a ſatisfaction, yet where there is a pre-

ſumption the teſtator's intent was otherwiſe, the court leans againſt the rule. 2 *Atk.* 301. 1742. *Nicholls* v. *Judſon.*

13. *S.*, by a codicil without any date, gives 1000*l.* a-piece to *Mary* and *Sarah Robins*, and if either die before their legacies are paid, the whole to the ſurvivor; each of the legacies directed to remain in the executor's hands till the legatees attain 21. *S.* afterwards enters into two bonds, one to *Mary* and another to *Sarah*, reciting he was deſirous to provide for their maintenance; each of the bonds was in the penalty of 4000*l.* for ſecuring 2000*l.* provided they marry in his lifetime with his conſent, or in caſe they ſurvive him: as the principal ſums given by the bonds are upon two contingencies, they ought not to be conſidered as a ſatisfaction of the legacies under the codicil. 2 *Atk.* 491. 1742. *Spinks* v. *Robins.*

14. A legacy to a daughter under the will of the father, held to be ſatisfied by giving her a marriage portion afterwards. *Ibid.* 492.

15. A legacy to a creditor is a ſatisfaction, if it be equal, or exceeds the debt; otherwiſe if given upon a contingency. *Ibid.* 493.

16. A legacy of 1000*l.* given under the will of *J.* to the plaintiff, not ſatisfied by the 500*l.* given upon her marriage in the teſtator's lifetime. 2 *Atk.* 516. 1742. *Shudall* v. *Jekyll.*

17. *W.* by will gives to her ſervant *G.* 500*l.* to be paid her within three months after *W.*'s death, and in another part, ſays, "*I give* 5*l. a-piece to the reſt of my ſervants, but not to G., becauſe I* "*have done very well for her before,*" and by a latter clauſe gives her lands in truſt to pay her legacies. *W.*, at her death, owed *G.* 260*l.* on bond. On the circumſtances of the will, it was held, that there was ſufficient to rebut the preſumption that the legacy was given in ſatisfaction of the debt. 3 *Atk.* 65. 1743. *Richardſon* v. *Greeſe.*

18. A legacy, which ought to be deemed a ſatisfaction, muſt take place immediately at the teſtator's death, for a debt being due then, the legacy muſt be due too; and not being payable in this caſe till a month after, the court held it no ſatisfaction. 3 *Atk.* 96. 1744. *Clark* v. *Sewell.*

19. In the caſes of ſatisfaction, one rule is, that it depends on the intent of the party, and which way ſoever the intent is, that way it muſt be taken. 3 *Atk.* 326. 1746. *Deacon* v. *Smith.*

20. Deviſe of an annuity cannot be a ſatisfaction for a larger one granted before; otherwiſe if the annuity by will was larger or equal; but if the teſtator was chargeable with two annuities, and deviſes an annuity equal but to one, it will not be a ſatisfaction for either. 1 *Veſ.* 263. 1749. *Graham* v. *Graham.*

21. *A.* agrees to ſettle 100*l. per annum* on his intended wife, but falling ill, he deviſes 100*l. per annum* to her; recovering, he marries her, and the ſettlement is carried into execution; ſhe can take but one annuity. 1 *Veſ.* 501. 1750. *Seed* v. *Bradford.*

22. Legacy of a moiety of a reſidue is no ſatisfaction for an annuity the teſtator was to pay under the will of his teſtator. 1 *Veſ.* 519. 1750. *Barret* v. *Beckford.*

23. Deviſe of a reſidue of real and perſonal eſtate for life, is not a ſatisfaction for a ſum to be laid out in lands in fee by articles. 2 *Veſ.* 37. 1750. *Alleyn* v. *Alleyn.*

24. Houſes purchaſed in *London* cannot be ſaid to be a ſatisfaction of a covenant in marriage articles, as farm houſes, which go along with the eſtate may. 2 *Veſ.* 276. 1751. *Pinnel* v. *Hallet.*

25. A debtor deviſes a much larger legacy upon a condition, which by a ſubſequent deed it becomes impoſſible to perform; by the will, it would not have been a ſatisfaction, as it was for another purpoſe; but being freed from the condition by the deed, it is then a ſatisfaction. 2 *Veſ.* 635. 1755. *Matthews* v. *Matthews.*

26. It is a general rule, that a legacy larger than or equal to a debt is a conſtructive ſatisfaction; but any minute circumſtance is laid hold of to take it out of that, as it muſt be as certain as to the duration or commencement. *Ibid.* See alſo 2 *Atk.* 301. *Nicholls* v. *Judſon.* 3 *Atk.* 68. *Richardſon* v. *Greeſe.* 3 *Atk.* 98. *Clark* v. *Sewell.* 1 *Veſ.* 519. 3 *Veſ. jun.* 529. and 564. S. P. 4 *Veſ. jun.* 483. S. P.

27. A legacy to an executor excludes him from the undiſpoſed ſurplus, but it is not at the ſame time a ſatisfaction for a debt. 2 *Veſ.* 637. *Ibid.*

28. *Michael Kencaid*, 19th *November* 1720, drew a bill of exchange on Lord *Montgomery* for 500*l.* payable to *William Dundas* or order, which was indorſed to the plaintiff. Lord *Montgomery* accepted the bill, but it was afterwards proteſted for non-payment. In *April* 1747 Lord *Montgomery* died, having by will deviſed his real eſtates in truſt to pay his juſt debts. Bill to be ſatisfied the 500*l.* under the truſts of the will. One of the queſtions was, whether payment was to be preſumed from the great length of time. *Per* Lord *Hardwicke*, Chancellor. "No pretence or proof "was made of any demand of this money; and though Lord "*Montgomery* was greatly diſtreſſed with debts, and was charged "in gaol for 120,000*l.*, yet, in 1725, he was diſcharged; and, "on the death of his father, had a very large eſtate, though "greatly incumbered. It was proved, that he kept a houſe and a "large family in *Red Lion Street*, was eaſy of acceſs, and went to "places of public reſort. There is no pretence he was not able "to pay ſuch a debt as the plaintiff demands; he paid his tradeſmen's bills once in every year; and it is impoſſible to believe that "the plaintiff, a merchant in *London*, during that time ſhould not "apply to him for payment; and it would be dangerous to lay "down a rule, that if a nobleman or other perſon is greatly involved, a creditor may claim a debt after 30 years, though no "demand had been made of it, and the debtor was viſible, and to "be met with." After making the above obſervations, Lord *Hardwicke* declared the debt to be preſumed ſatisfied. *Ambl.* 231. 1794. *Oughterloney* v. *Earl Powis.*

29. Portion

29. Portion given by a father by will satisfied by a portion advanced in his lifetime. *Ambl.* 325. 1756. *Watson* v. *Earl of Lincoln.*

30. Deviſe to a wife held to be a ſatisfaction for dower. *Ambl.* 466. 1764. *Arnold* v. *Kempſtead & ux.* See *Villareal* v. *Lord Galway, Ambl.* 682. *Jones* v. *Collier and others,* 730. S. P.

31. Teſtator gave a bond to truſtees, conditioned that his executors ſhould pay 5000*l.* to his natural ſon at 21; by will he gave 15,000*l.* to truſtees to pay to the ſon a maintenance until 25, and then to pay the whole to him with contingencies on marriage; this is no ſatisfaction of the bond. 1 *Bro. Ch. Rep.* 295. 1783. *Peacock* v. *Falkener.*

32. The value of a beneficial leaſe, granted to a natural ſon, held not to be a ſatisfaction of a legacy given by the putative father's will. 1 *Bro. Ch. Rep.* 425. 1785. *Grave* v. *Earl of Saliſbury.*

33. Parent paying a portion is preſumed to mean to perform the gift of a legacy, unleſs there be ſufficient evidence to repel the preſumption. 2 *Bro. Ch. Rep.* 306. *Elliſon* v. *Cookſon.* 3 *Bro. Ch. Rep.* 61. S. C. 1 *Veſ. jun.* 100. S. C.

34. A gift of 20,000*l.* to daughters, by a codicil to their father's will, held a cumulative proviſion for them, without prejudice to their claim of 2000*l.* each under the father's marriage ſettlement. 2 *Bro. Ch. Rep.* 352. 529. *Hanbury* v. *Hanbury.*

35. A bond by their brother, ſon of the ſettlor, for payment of 10,000*l.* out of his perſonal eſtate, not a ſatisfaction of the claims of the daughters under the ſettlement. *Ibid.*

36. Gift of a reſidue is a ſatisfaction for money ſecured to be paid by marriage articles. 2 *Bro. Ch. Rep.* 384. 1788. *Pearſon* v. *Morgan.*

37. A portion, given after a legacy, ſhall not be a ſatisfaction of it, where it is expreſsly given in ſatisfaction of a different claim, or where it is given abſolutely, and the legacies under limitations. 3 *Bro. Ch. Rep.* 192. 1790. *Baugh* v. *Read,* 1 *Veſ. jun.* 257. S. C.

38. A legacy cannot be a ſatisfaction for a claim *aliunde,* unleſs clearly expreſſed to be ſo intended. *Ibid.*

39. A father by will gives the reſidue to his three natural children equally; he afterwards gives two of them, being daughters, marriage portions: this is not a ſatisfaction *pro tanto.* 4 *Bro. Ch. Rep.* 493. 1794. *Smith* v. *Strong. Freemantle* v. *Benches,* 5 *Veſ. jun.* 79. S. P.

40. Members of a ſociety covenanted mutually that their widows ſhould receive annuities from the ſociety; payment from the ſociety is not a ſatisfaction for a covenant in a ſettlement by a huſband to pay his widow an annuity in lieu of all claim on his perſonal eſtate. 1 *Veſ. jun.* 96. 1790. *Rhodes* v. *Rhodes.*

41. A negotiable bill of exchange is not ſatisfied by a legacy. 3 *Veſ. jun.* 561. 1797. *Carr* v. *Eaſtabrook.*

42. As

42. As to a presumed satisfaction of a debt by a legacy, there is no distinction between the cases of parent and child, and those of strangers; therefore circumstances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of satisfaction. 4 *Ves. Jun.* 483. 1799. *Talson* v. *Collins.*

43. Distinction between a legacy and a residuary bequest, as to the presumed satisfaction by the advancement of a portion, the presumption from the former does not arise from the latter. 5 *Ves. jun.* 79. 1799. *Freemantle* v. *Benches.*

44. A provision by marriage settlement, in lieu, bar, and satisfaction of all dower or thirds, which the wife might otherwise be entitled to out of all the real and personal estate, held to bar her interest in what was not disposed of by the will of her husband. 6 *Ves. jun.* 385. 1801. *Druce* v. *Denison.*

45. Upon a question of presumed satisfaction in a hard case, the court of Chancery gave the executors leave to bring an action upon the bond, but would not direct it. 6 *Ves. jun.* 516. 1801. *Reeves* v. *Brymer.* *Brymer* v. *Reeves.*

Scire Facias. [G]

(G) Proceedings and Pleadings. 19 Vin. 285.

1. THE defendant died after the rule to plead was out, but before the time given to him by the judge's order for pleading was out, and the plaintiff signed an interlocutory judgment, and sued out a *scire facias* thereupon against the defendant's executor upon the stat. *Will.* 3. *c.* 11. *s.* 6. to shew cause why damages should not be assessed and recovered. It was moved to set aside the proceedings, on the ground that the writ abated by the death of the defendant before interlocutory judgment was signed, notwithstanding the rule to plead was out, and the case of *Sibert* v. *The Executor of General Russell, Mich.* 9 *G.* 2. was cited, where it appeared the general died at *Bath* a day or two before the time for pleading was expired. Lord *Hardwicke* and the court held the suit abated. Proceedings set aside as irregular. *Wallop* v. *Irwin*, 1 *Wils.* 315.

2. Where a defendant dies after a writ of inquiry executed, and before the return thereof, the *sci. fa.* against his executor must be to shew cause why the damages should not be recovered. *Goldsworthy* v. *Southcott*, 1 *Wils.* 243.

3. A *scire facias* to revive a former judgment is so far a continuation of the same action, that if the plaintiff's testator had agreed

agreed not to bring a writ of errror in that former action, ſuch agreement ſhall bind his executors upon the *ſcire facias* being brought againſt them. *Executors of Wright* v. *Nutt* (in error), 1 *Term Rep.* 388.

4. The 8 & 9 *Will.* 3. *c.* 11. giving *coſts* in all ſuits of *ſcire facias*, does not extend to a *ſcire facias* to repeal a patent proſecuted in the name of the king. *The King* v. *Miles*, 7 *Term Rep.* 367.

5. *Scire facias* ought to be made returnable according to the nature of the original ſuit below, as, if the original ſuit was returnable on a day certain, and the *ſci. fa.* on a general return, or *vice verſa*, the *ſci. fa.* may be quaſhed on motion. *Ld. Raym.* 1417. 1 *Stra.* 694.

6. If the original plaintiff dies pending error, his executor may have *ſcire facias quare*, &c. out of *C. B.* before record tranſcribed; after, out of *B. R.*; and plaintiff in error may have *ſcire facias ad audiend.* out of *B. R.* againſt executor. *Barnes*, 432.

7. Where a judgment was entered for ſecuring the payment of an annuity *before* the ſtatute 17 *G.* 3. *c.* 26. which enacts, "that before any execution ſhall be ſued out or *action* brought, on any ſuch judgment already entered, a memorial of the deed, bond, inſtrument, &c. ſhall be enrolled in chancery," a *ſcire facias*, iſſued after the act to revive the judgment, was ſet aſide for want of ſuch a memorial, becauſe it was an action upon the judgment, and therefore within the ſtatute. 1 *Term Rep.* 267, 8. *Fenner* v. *Evans.*

8. There muſt be a rule on the *ſci. fa. quare executio*, &c. before there can be a rule to aſſign errors. *Marſhal* v. *Cope*, 2 *Stra.* 917.

9. If the defendant in error from *C. B.* into *B. R.* give an eight day rule to certify the record, the record may be certified in leſs time, though the rule expire in vacation; and a *ſcire facias quare executionem non* having been iſſued immediately upon the record being certified, returnable the firſt day of the following term, the defendant may ſerve the plaintiff in error on that day with a rule to appear to the *ſcire facias*, and a rule to aſſign error. *Sambridge* v. *Houſley*, 2 *Term Rep.* 17.

10. It is irregular to rule the plaintiff in error to aſſign errors before the expiration of the rule to appear to the *ſci. fa.* *James* v. *Staples*, 6 *Term Rep.* 367.

11. Judgment being entered on a bond to ſecure the quarterly payment of an annuity, and a *fi. fa.* having iſſued for the arrears of the laſt half year, a ſecond *fi. fa.* may be taken out for the next quarter without reviving the judgment by *ſcire facias.* *Scott* v. *Whalley*, 1 *H. Black.* 297.

12. A *ſcire facias* on a judgment muſt purſue the terms of the judgment. Therefore where an executor pleads *plene adminiſtravit*, and the plaintiff does not take iſſue on it, but takes a judgment of aſſets *quando acciderint*, the *ſcire facias* on that judgment muſt only pray execution of ſuch aſſets as have come to the executor's hands ſince the former judgment; and if it pray execution of

of assets generally, without confining it to that time, it cannot be supported. *Mara* v. *Quin*, 6 *Term Rep.* 1.

13. A *scire facias* must lie in the sheriff's office the last four days before the return. *Forty* v. *Hermer*, 4 *Term Rep.* 583.

14. Rule *nisi* to set aside execution for want of *scire facias* to revive the judgment; it appeared that the whole delay had arisen on the part of the *defendants* by bills in Chancery for *injunctions*, and by obtaining *time for payment*, &c. And the court were unanimous, that the rule "of reviving a judgment of above a year "old by a *scire facias* before suing out execution upon it," which was intended to prevent a surprize upon the defendant, ought not to be taken advantage of by a defendant who was so far from being surprized by the plaintiff's delay, that he himself had been trying all manner of methods whereby *he* might delay the plaintiff; and therefore they not only discharged the rule but discharged it with costs. *Ibid.*

15. A plea to a *scire facias* must conclude, "if the plaintiff ought to have or maintain his *action*." *Grey* v. *Jones*, 2 *Wils.* 251.

16. Declaration may be entitled of the term generally, though the *sci. fa.* is returnable the last term. *Ward* v. *Gansell*, 3 *Wils.* 154.

17. If on judgment of *Michaelmas term*, execution is stopt by injunction, and afterwards taken out tested the last day of the subsequent *Michaelmas* term, it is irregular, without a *sci. fa.* A writ of error is matter of record, which the court can take notice of, but the injunction is not. *Winter* v. *Lightbound*, 1 *Stra.* 301.

18. To a *scire facias* on a judgment the defendant can plead nothing in bar which he might have pleaded to the original action. *Cook* v. *Jones*, 2 *Cowp.* 728.

19. If a *scire facias* is brought upon a recognizance, and execution is awarded, there may be another *sci. fa.* upon the same recognizance. 1 *Comyns's Rep.* 32.

20. A *sci. fa.* was brought by baron and feme upon a judgment recovered by the feme while sole, and after execution awarded the husband dies, a right is attached in the wife. *Ib.* 31.

21. If the plaintiff in an action, after judgment and a writ of error allowed, become bankrupt, his assignees cannot sue out a *sci. fa.* in their own names to compel an assignment of errors till some judgment be given, and then it must be done immediately after such judgment; but they shall go on with the writ of error in the bankrupt's name till judgment. 1 *Term Rep.* 463. *Vide* 3 *Term Rep.* 437.

22. Where a *scire facias* issued against *B.* after the seizure of all the partnership goods upon a judgment and execution against *A.* and the sheriff returned *nulla bona*, it was holden a false return. *King* v. *Manning*, 2 *Comyns*, 619.

23. A man cannot plead to a *scire facias* matter which avoids or abates the writ. *Phillips* v. *Fowler*, 2 *Comyns*, 525.

24. The husband cannot have *execution* for the costs on a plea of coverture without a *sci. fa.* *Dougl.* 637.

25. Execution

25. Execution will not be permitted to iſſue on a *ſci. fa.* to revive an old judgment, till a *ſcire feci* returned, or an affidavit of notice. 2 *H. Black.* 1140.

26. Fifteen days between the *teſte* and return of two *ſcire facias*'s inclusive is ſufficient. *Goodwin* v. *Bearbank*, 1 *Comyns*, 53.

Seats in a Church.

(A) Actions and Pleadings.

19 Vin. 296.

1. POSSESSION for above 60 years of a pew in a church was held not to be a ſufficient title to ſupport an action on the caſe for diſturbance in the enjoyment of it: it being neceſſary to prove a preſcriptive right or a faculty; and it muſt be claimed as appurtenant to a meſſuage in the pariſh. A faculty to a man and his heirs is bad. *Stocks* v. *Booth*, 1 *Term Rep.* 428.

2. Where, upon the rebuilding a church, a certain pew was aſſigned, by the rector and churchwardens, to *A.*, who enjoyed it under that title for 36 years; the court preſumed the poſſeſſion to have been given him under ſome immemorial right appurtenant to his meſſuage. *Rogers* v. *Brooks*, 1 *Term Rep.* 431. (*note.*)

3. Upon a libel in the conſiſtorial court for diſturbance of the plaintiff's right to a pew, the court adjudged the right to be in the plaintiff, and admoniſhed the defendant not to ſit in the pew; the court of arches reverſed the ſentence, but admoniſhed the defendant not to uſe the pew again; theſe ſentences were held not concluſive evidence of the plaintiff's right in an action for a diſturbance between the ſame parties. *Croſt* v. *Salter*, 3 *Term Rep.* 639.

4. In an action for diſturbance in a pew againſt a ſtranger, the plaintiff need not lay, nor prove that he repaired it, for poſſeſſion is ſufficient; *aliter* in a diſpute with the ordinary. *Kenrick* v. *Taylor*, 1 *Wilſ.* 326.

5. Where the plaintiff, in an action againſt a wrongdoer, in a pew in the church in the poſſeſſion of the plaintiff, proved uninterrupted poſſeſſion from the building of the church, 30 years ago, to that time; the court held, that he could not recover upon this, as annexed by preſcription to his antient meſſuage; for the preſumption ariſing from length of poſſeſſion is rebutted by ſhewing the commencement of the right. *Griffith* v. *Matthews*, 5 *Term Rep.* 296.

Securities.

(B) Relief againſt them, in reſpect of the Conſideration. 19 Vin. 295.

1. THE court will not eaſily ſet aſide a ſecurity made under a decree, and approved of by the Maſter. 3 *P. Wms.* 9. 1724. *Mills* v. *Banks.*

2. *A.* treats for the marriage of his ſon, and in the ſettlement on the ſon there is a power reſerved to the father to jointure any wife whom he ſhould marry in 200*l. per ann.* paying the ſon 1000*l.*; the father treating about marrying a ſecond wife, the ſon agrees with the ſecond wife's relations to releaſe the 1000*l.* and does releaſe it; but takes a private bond from the father for the payment of this 1000*l.*, equity will not ſet aſide this bond, becauſe it would be injurious to the firſt marriage, which being prior in time is to be preferred. 3 *P. Wms.* 66. 1730. *Roberts* v. *Roberts.*

3. Any voluntary bond is good againſt an executor, though to be poſtponed to a ſimple contract debt. 3 *P. Wms.* 223. 1733. *Lechmere* v. *Earl Carliſle.*

4. *A.* having a wife who lived ſeparate from him, afterwards courted and married another woman, who knew nothing of the former wife being alive; but it being diſcovered to the ſecond wife that the former was alive, *A.*, in order to prevail upon the ſecond wife to ſtay with him, ſome years afterwards gave a bond to a truſtee of the ſecond wife to leave her 1000*l.* at his death, and died, not leaving aſſets to pay his ſimple contract debts; if this bond had been given immediately upon the diſcovery, and they had parted thereupon, it would have been good; but being given in truſt for the ſecond wife, after ſuch time as ſhe knew the firſt was living, and to induce her to continue with *A.* this was worſe than a voluntary bond, and was decreed to be poſtponed to all the ſimple contract debts. 3 *P. Wms.* 340. 1734. *Lady Cox*'s caſe.

5. A bond payable by inſtalments, the obligee, upon breach of payment at the firſt inſtalment gets judgment on the whole penalty; on payment of the money due and coſts, even a court of law will relieve the obligor. 1 *Atk.* 118. 1744. *Ex parte Groome.*

6. Where plaintiff, an executor, had pleaded at law *non eſt factum* to an action upon a voluntary bond of his teſtator's, equity could only relieve him againſt the penalty, upon payment of principal,

cipal, intereſt, and coſts, without regard to his having aſſets or not, the plea of *non eſt factum* being conſidered an admiſſion of aſſets. 1 *Atk* 294. 1737. *Ramſden* v. *Ramſden.*

7. Lord *Hardwicke* Chancellor, thought it a very ſtrong ſuſpicion of fraud in this caſe, that two ſeparate bonds ſhould be given upon the ſame day for different ſums, and one of them juſt double the penalty of the other, where one bond for the whole ſum was the moſt proper and natural method, and therefore directed an inquiry before the Maſter, as to the conſideration of the bonds. 2 *Atk.* 17. *Nov.* 1739. *Read* v. *Read.*

8. A ſchool-boy contracts a debt of 59*l.* for burgundy, champaign, claret, *&c.* with *G.* a victualler, in five months time; in a few days after he came of age. *G.* prevails upon him to give a note for the 59*l.* without producing any account, or delivering him a bill; note ordered to be delivered up to be cancelled. 2 *Atk.* 34. *April* 1740. *Hobart* v. *Gally.*

9. Two perſons, executors and truſtees under a will, would not prove the will, nor ſuffer the *ceſtui que truſt* to take out letters of adminiſtration *cum teſtamento annexo*, till he had executed a deed, by which he was to pay 100*l.* to one executor and 200*l.* to the other, within ſix months after they ſhall have exhibited an inventory. Lord *Hardwicke* declared the deed was unduly obtained, and decreed that no allowance ſhould be made for the ſaid ſums to the plaintiffs. 2 *Atk.* 58. *Oct.* 1740. *Ayliffe* v. *Murray.*

10. A ſolicitor having taken a judgment of his client for 400*l.* whilſt the cauſe was depending, and alſo ſeveral extraordinary charges appearing in his bill; Lord *Hardwicke* Chancellor referred the bill to be taxed, though it had been adjuſted and allowed 17 years, and ordered the judgment and ſecurities to be delivered up. 2 *Atk.* 295. 1742. *Drapers' Company* v. *Davis.*

11. A ſolicitor makes an abſolute conveyance to himſelf of 1000*l.* from the plaintiff's wife, whilſt ſhe was parted from her huſband: the conſiderations expreſſed in the deed, are *for ſervices done, and favours ſhewn*; the bill was to ſet aſide the deed as obtained by fraud, the deed ordered to ſtand for a ſecurity only for ſuch ſum as was juſtly due to the defendant. 2 *Atk.* 296. *May* 1742. *Sir Wm. Saunderſon* v. *Glaſs.*

12. A mortgagee, where the mortgage was only four and a half *per cent.* compelled the mortgagor to turn the intereſt into principal at five *per cent.* at the end of every ſix months, and at the time the mortgage was paid off, inſiſted on an advance of ſix months' intereſt, over and above what was due; the bill was for relief againſt the mortgagee, and to ſet aſide the grant to the defendant of the place of ſteward to a manor of the plaintiff's, as obtained by fraud, which relief was granted. 2 *Atk.* 330. 1742. *Thornhill* v. *Evans.*

13. Lord *Rivers*, by will, gave an annuity of 50*l.* to the plaintiff, who afterwards, in 1726, married the defendant *Fityer*: in 1728 they agreed to part; by a deed of ſeparation the huſband covenanted to allow her 14*l.* *per ann.* out of his own eſtate, and 24*l.*

more

more to be paid quarterly out of the annuity of 50*l.*, and 12*l.* a-year to his daughter by the plaintiff, for her maintenance, to be paid quarterly. The bill was againſt the huſband and *Stephens*, a creditor of his ſince the execution of the deed of ſeparation, to have the truſts of that deed performed; the court decreed according to the prayer of the bill againſt the huſband: but as to *Stephens*, directed that he ſhould not be compelled to releaſe his claim upon the annuity till the plaintiff had paid him his debt, the court being of opinion, that the conſideration of the deed was not good againſt the creditors of the huſband. 2 *Atk.* 511. 1742. *Fityer* v. *Fityer and Stephens.*

14. Plaintiff, *Hannah Woodhouſe*, and defendant, having carried on a courtſhip for ſome time contrary to the wiſhes of plaintiff's father; in *January* 1782, the following bonds were executed between them, *viz.* a bond from the plaintiff in the penalty of 600*l.* "with condition, that if ſhe, the above bounden *Hannah Woodhouſe* do, on or before the expiration of 13 months after the deceaſe of her father, eſpouſe and marry the above-named *Ralph Shepley*, (the defendant) if the above-named *Ralph Shepley* will thereunto aſſent, and the laws of this realm permit the ſame; or if it ſhall happen that the ſaid *Hannah Woodhouſe* ſhall not nor will marry the ſaid *Ralph Shepley* as aforeſaid, but ſhall happen to marry with ſome other perſon, then the ſaid *Hannah Woodhouſe* ſhall and will well and truly pay or cauſe to be paid unto the ſaid *Ralph Shepley* the ſum of 500*l.* at or immediately after failure of ſuch marriage: but if it ſhall happen that the ſaid *Hannah Woodhouſe* ſhall die before the time limited and appointed for the ſaid marriage, then if the ſaid *Hannah Woodhouſe* ſhall leave and give the ſaid *Ralph Shepley* 10*l.* as a token of her love to buy him a ſuit of mourning, then this obligation to be void." A bond from him in the like penalty, with a ſimilar condition as to his marrying the plaintiff: and, "in caſe of his marrying another woman, then he covenanted and agreed to forfeit, ſurrender, and yield up to the ſaid *Hannah Woodhouſe*, for her own uſe all his real and perſonal eſtate, but if he ſhould die before the time limited for the ſaid marriage, then the ſaid *Hannah Woodhouſe* was to have for her own uſe one half of all his real and perſonal eſtate." And on the ſaid laſt mentioned bond there was an indorſement by the ſaid *Ralph Shepley* to ſettle upon the ſaid *Hannah Woodhouſe* a yearly dower, according to the portion ſhe ſhould have. On a bill by *Hannah Woodhouſe* to be relieved againſt this bond. Lord *Hardwicke* was of opinion, that the plaintiff was entitled to be relieved, and declared, though none of the circumſtances ſingly might prevail to overturn the bond, yet they were ſufficient together: but the chief of them was, the encouragement this might give to diſobedience, and the fraud on parents: and on the whole decreed it to be delivered up to be cancelled. 2 *Atk.* 535. *March* 1742. *Woodhouſe* v. *Shepley.*

15. Bill, after an acquieſcence of five years, and after a mother's death, againſt her repreſentative, to ſet releaſes aſide, as

unduly obtained by her, and for an account of his father's and grandfather's eſtates, and to be paid his full ſhare thereof: the procuring releaſes from a perſon immediately upon his coming of age is always a circumſtance to create ſuſpicion, but there is no particular impoſition charged through the defendant's means, and therefore the court would not determine as to the unfairneſs of the releaſe, till the Maſter had taken an account of the father's perſonal eſtate. 3 *Atk.* 423. 1746. *Steadman* v. *Palling.*

16. The court will not determine bonds to be voluntary, if they do not exactly tally with the ſum given for them; but if the contract was fairly entered into without any circumſtance of fraud, it has been held to be made for a valuable conſideration. 3 *Atk.* 481. 1747. *Blunt* v. *Doughty.*

17. A deed executed by one juſt after coming of age to an agent conveying a reverſion for 180*l.* when a bounty or gift only was intended, but no fraud; the deed was not abſolutely reſcinded, but the agent was decreed to releaſe the covenants. 1 *Veſ.* 379. 1749. *Cray* v. *Mansfield.*

18. Bill lies for creditor by elegit to ſet aſide a fraudulent conveyance, whether he could recover at law or not; and a conveyance is fraudulent, if without delivery of poſſeſſion, though part a real conſideration. 2 *Veſ.* 51. 1750. *Bennet* v. *Muſgrove.*

19. *A.*, aged thirty, borrows 5000*l.* on bond to pay 10,000*l.* if he ſurvives *B.* aged 78; *A.* ſurvives a year and eight months, having on the death of *B.* confirmed the bargain by a new bond, &c. freely, and paying part; the court refuſed to give relief, except as to the penalty. 2 *Veſ.* 126. 1750-1. *Earl of Cheſterfield* v. *Janſſen.* 1 *Atk.* 301. S. C.

20. Bill to ſet aſide a bill of ſale of plaintiff's prize-money, made for 150*l.* and a ſubſequent agreement confirming it. The original ſale was to Dr. *Jenniſon*, a phyſician at the place, where the prize was brought in, and where the plaintiff was then ſick; the ſecond agreement recited the bill of ſale for 150*l.* *ſterling*; then recited that a bill in Chancery had been filed to ſet it aſide, which the plaintiff agreed ſhould be diſmiſſed with coſts; and in conſideration of 60*l.* paid or ſecured to be paid, the plaintiff confirms and eſtabliſhes the bill of ſale, and renounces all claim on account of the prize or other demands, and all ſuits at law or in equity, and ſecurity was given the ſame day for payment of the 60*l.*; the confirmation was ſet aſide. 2 *Veſ.* 282. 1751. *Taylour* v. *Rochford.*

21. An aſſignment of a ſailor's prize-money at a great undervalue was ſet aſide for fraud, but allowed to ſtand as ſecurity for what was really advanced. 2 *Veſ.* 517. 1754. *How* v. *Weldon and others.*

22. *George Green*, valet to the plaintiff, prevailed on his maſter to convey an eſtate to him on *pretence* of qualifying him to kill game, and though there was a formal livery of ſeiſin, yet he never was in the poſſeſſion, and the rent was paid to the plaintiff, who afterwards ſold that eſtate, and conveyed another to *George Green* in

in conſideration of his delivering up that, and upon the ſame pretence as before, but the rent ſtill continued to be paid to the plaintiff. Theſe conveyances were executed at ſuch time as *George Green* had got the plaintiff to live from his wife, and imported on the face to be in conſideration of 3500*l.* but no money was ever paid or intended to be paid; and on the defendant's part was read a letter under the plaintiff's own hand, deſiring to have 3500*l.* inſerted in the deed as a conſideration; then the plaintiff makes a mortgage of his whole eſtate, in which *George Green* was not conſidered as owner; and the pretence of mortgaging was to enable the plaintiff and *George Green* to travel and to learn the languages for that purpoſe. The money raiſed by the mortgage was 5000*l.* of which 3000*l.* was paid to *George Green* and his wife: 1000*l.* to *Thomas* the brother of *George Green*, and 1000*l.* to *William Lock*, the attorney employed in the mortgage, but in truſt for the ſon of the ſaid *William*, who alſo got from the plaintiff two promiſſory notes for 105*l.* and 123*l.*, the one for procuring the money, the other for his bill of coſts. Plaintiff filed his bill for relief, upon the grounds that he was weak and liable to be impoſed upon, and that advantage was taken by an artful ſervant. 2dly, That this conveyance was made and the money paid on a fictitious conſideration, now ſet up as a gift. The court ſet aſide the conveyance, and ordered the defendant to account. 2 *Veſ.* 627. 1755. *Bridgman* v. *Green.*

23. *William Petty* made a ſecret conveyance of ſeveral eſtates to his daughter, who was married and had a portion, and was jointured. He kept poſſeſſion of the eſtates and the deeds, and afterwards by his will deviſed theſe eſtates. Held the deviſe was good; the conveyance being kept ſecret, and he continuing in poſſeſſion of the eſtate. There was evidence that he made the conveyance to avoid being ſheriff of *London*, by putting the legal intereſt out of himſelf, and thinking by that means he might ſwear to his want of qualification; but it appeared he did not take the oath, but paid the fine for not ſerving the office. *Ambl.* 264. 1775. *Birch* v. *Blagrave.*

24. Grant of a reverſionary rent charge, after the death of the plaintiff's father (who was old and infirm) upon unreaſonable terms, ſet aſide; but to remain as a ſecurity for the money really advanced, and coſts to be paid as in redeeming a mortgage. 1 *Bro. Ch. Rep.* 1. 1778. *Gwynne* v. *Heaton and others.*

25. An annuity purchaſed *for four years' purchaſe*, on a life of 30 years, ſubject ſlightly to the gout; ſet aſide for inadequacy of conſideration. 2 *Bro. Ch. Rep.* 167. 1787. *Heathcote* v. *Paignon.*

26. *A.* having an eſtate in fee of 6000*l.* a-year, and being tenant for life without impeachment of waſte of another eſtate of 5000*l.* a-year, with the reverſion in fee after an eſtate in tail male in *B.* his only ſon by a former marriage, became indebted by mortgage, annuities, and otherwiſe, to the amount of near 100,000*l.* *A.* and *B.* joined in conveying both eſtates to truſtees

upon truſt by ſale or mortgage, ſale of timber, or by rents and profits, to pay debts, and to apply ſo much of the rents and profits of what ſhould remain unſold, as ſhould ſeem meet to them, as a ſinking fund, and to pay the reſidue to *A.*, and to ſettle the remaining truſt eſtates, ſubject to an annuity of 1000*l.* to *B.* for the joint lives of him and *A.*, upon *A.* for life without impeachment of waſte, with power to leaſe for 21 years only; remainder to truſtees to preſerve, *&c.* remainder ſubject to a jointure to the wife of *A.* and portions for children by her, to the joint appointment of *A.* and *B.*; in default thereof to the appointment of *B.* ſurviving; in default thereof to *B.* in tail male; remainder to the other ſons of *A.* in tail male; remainder to *B.* in tail; remainder to the daughters of *A.* in tail, with croſs remainders; remainder to *B.* in fee, with powers of leaſing; and full powers of management in the truſtees, and a proviſion for the appointment of new truſtees, as vacancies ſhould happen. The truſtees raiſed 50,000*l.* by mortgage of the ſettled eſtate, which they applied to the debts, and they paid 2500*l.* a-year to *A.* and 1000*l.* a-year to *B.* from the date of the ſettlement. Upon the bill of *A.* to ſet aſide the deed, except the truſt for the debts, upon a general charge of fraud, miſapprehenſion, and miſrepreſentation, or to controul the management of the truſt, and for an account againſt the truſtees; the court held, firſt, that the deed could not be ſet aſide partially for fraud; nor under this bill totally; for then the prior eſtates in the ſettled eſtate muſt be re-veſted clear of incumbrances. *A.* being under covenant to exonerate, and the mortgagees who muſt either conſent to change their ſecurities or be paid, were not parties. 2dly, That general charges of fraud required no anſwer, and could not ſupport a decree; that upon the evidence there was no fraud or miſtake; and that *B.*'s joining to ſubject the ſettled eſtate was ſufficient conſideration. 3dly, That the court would not interfere with the truſtees, there being no miſbehaviour; and that the payment of the annuity to *B.* was good. The bill was therefore diſmiſſed with coſts; and the truſtees having been always ready to account, the court refuſed to retain it for that purpoſe; but without prejudice to a bill for that only. 2 *Veſ. jun.* 391. 1794. *Myddleton* v. *Lord Kenyon.*

27. Upon a deed of compoſition, one creditor was prevailed upon by the debtor to repreſent his debt below the real amount: receiving notes for the dividend upon the remainder, and bonds for the remainder of his debt beyond the amount of the dividend. Upon the bill of the debtor and a creditor, party to the deed, the bonds were decreed to be delivered up; but the court was of opinion the defendant would be entitled to the benefit of the notes, after all the truſts of the deeds were ſatisfied, though not as againſt the creditors; and directed an inquiry as to that reſerving the queſtion. 3 *Veſ. jun.* 456. 1797. *Eaſtabrook* v. *Scott.*

(C) Relief againſt them; *though* given *on* a ſeemingly good Conſideration.

19 Vin. 300.

1. AN annuity was granted by the late Duke of *Wharton* to Dr. *Young*, in conſideration that the public good is advanced by the encouragement of learning, and in conſideration likewiſe of the love he bore him; this is not a legal conſideration, nor valuable in the eye of the law. 2 *Atk.* 153. 1740. *Stiles* v. *The Attorney-General.*

2. Bond by *A.* in 1720, for payment of 520 within ſix months after his father's death, if he ſurvived, otherwiſe to be void; the father then 70; he dies in 1731; the ſon died in 1734: the court relieved againſt the penalty only; there was no proof of impoſition, but very ſuſpicious circumſtances. 1 *Veſ.* 122. 1748. *Hill* v. *Caillovel.*

3. A bond was given as a reward for uſing influence over another's eſtate, for the benefit of the obligor; and was decreed to be delivered up, but without coſts. 1 *Veſ.* 276. 1749. *Debenham* v. *Ox.*

4. The plaintiff was preſented to the living of *Steyning* by the defendant, and previous thereto gave a general bond of reſignation. After the end of ſix years, on three months' requeſt, action of law and judgment upon the bond. Bill for an injunction, and *inter alia* for a diſcovery, whether the defendant had not ſold the advowſon ſince the end of the ſix years, with a promiſe of procuring an immediate reſignation? Defendant demurred to the diſcovery, as tending to ſubject him to the penalties of the ſtat. againſt ſimony. The court over-ruled the demurrer. *Ambl.* 268. 1753. *Grey* v. *Heſketh.*

5. Bond for money won at play, and part of it paid; the court ordered the money to be repaid, and relieved againſt the bond for the remainder. *Ambl.* 269. 1755. *Rawden* v. *Shadwell.*

6. Money advanced for procuring a commiſſion in the marines. The purchaſer, after ſix months, being diſcovered to have worn a livery, was diſcharged. The money was decreed to be refunded with intereſt. *Ambl.* 432. 1763. *Morris* v. *Mailloch.*

7. The ſale of a commiſſion in the army is not bad in itſelf, but the ſale of a public office is ſo. 4 *Veſ. jun.* 815. 1799. *Kennett* v. *Abbott.*

8. A perpetual injunction was granted againſt a bond for the purchaſe of an office, upon the public policy of the law, although the office was not within the ſtat. 5 & 6 *Ed.* 6. 1 *Bro. Ch. Rep.* 124. 1781. *Hanenington* v. *Du Chattel.*

9. Bonds, given for ſums taken up in order to ſell to raiſe money, ordered to be delivered up, upon payment of the money really raiſed. 1 *Bro. Ch. Rep.* 149. *Barker* v. *Vanſonner.*

10. An attorney cannot take from his client a bond for unliquidated coſts; and notwithſtanding ſuch bond and a mort-

gage had been given, the attorney's bill was ordered to be taxed; and, upon payment, he was ordered to re-convey, and the bond was declared void. 4 *Bro. Ch. Rep.* 350. 1793. *Newman* v. *Payne.* 2 *Veſ. jun.* 199. S. C.

11. Bond to ſecure an annuity to the obligor's mother for life; the condition reciting, that by the recommendation of friends he had been appointed to ſucceed his father in the command of a government packet, but on the expreſs condition of his making an allowance for the ſupport of his mother, &c. The Maſter of the Rolls inclined to diſmiſs the bill againſt his executor, but gave the plaintiff leave to bring an action. 4 *Veſ. jun.* 811. 1799. *Hartwell* v. *Hartwell.*

12. *Poſt obit* bonds, though upon terms of groſs inequality, eſtabliſhed; ſuch ſecurities not being liable to be impeached on the ground of uſury. 5 *Veſ. jun.* 27. 1799. *Wharton* v. *May.*

19 Vin. 301. **(D) Relief againſt them; the Conſideration not being performed.**

See *Agreement, Fraud, Purchaſor.*

19 Vin. 301. **(E) Relief againſt them *pro turpi Cauſâ.***

1. BOND and other ſecurities *pro turpi cauſâ* ſet aſide as to creditors, but the ſame proviſion being made by the will, query, whether that ſhall be ſet aſide as to executors or reſiduary legatee. 1 *Veſ.* 254. 1749. *Robinſon* v. *Gee.*

2. A young woman of good character comes to live with *J. S.*, knowing he was married; is ſeduced by him, and cauſes a ſeparation from his wife, and has a grant or bond from him: her bill for payment was diſmiſſed. 2 *Veſ.* 160. 1750. *Prieſt* v. *Parrot.*

3. The court refuſed to give relief againſt a bond given to a common proſtitute by a perſon after he had kept her for ſeveral years. *Ambl.* 641. 1767. *Hill* v. *Spencer.*

4. After a verdict upon a bond againſt the obligor, a bill was filed to have it delivered up, charging the conſideration to have been an agreement by the defendant to cohabit with the plaintiff as his wife, and that ſhe had lived in a ſtate of adultery and incontinence with various perſons, and praying a diſcovery. Demurrer allowed. 3 *Veſ. jun.* 368. 1797. *Fraſco* v. *Bolton.*

5. A bond, in conſideration of future cohabitation, void at law. *Ibid.*

6. A voluntary bond during cohabitation was given to a woman, previouſly of a very looſe life; ſoon afterwards another bond, expreſsly ſecuring a continuance of the connection by an annuity in caſe of ſeparation: a bill by the executor, to have the bonds delivered up, was diſmiſſed with coſts; the former being conſidered

conſidered unimpeached, the latter void at law, as *pro turpi cauſâ*. 5 *Veſ. jun.* 286. 1800. *Gray* v. *Mathias*.

(F) Transferred, or a *defective* Security *made good by ſubſtituting another in its Room.*

For more of *Securities* in general, ſee *Agreement*, *Fraud*, *Mortgages*, *Truſt*, *Uſury*, and other proper titles.

Seizure for the King.

(A) Statutes relating thereto.

19 Vin. 321.

1. 5 GEO. 3. *c.* 43. *ſ.* 1. Unentered goods, found concealed in any package or merchandize, ſent to the king's ſtore-houſes, or brought on ſhore by ſpecial order, and not ſpecified therein, are forfeited.

Sect. 2. Goods paying duty *ad valorem*, under-rated by the importer, may be ſeized by the officer, paying the owner 10*l. per cent.* above the value ſworn to.

2. 19 *G.* 3. *c.* 69. *ſ.* 1. Foreign ſpirits, being imported in caſks leſs than 60 gallons, are liable to forfeiture, together with the veſſel.

Sect. 2. When any goods are liable to forfeiture for being found in any veſſel within the ports of this kingdom, or hovering on the coaſt, the veſſel alſo, if coming from any part of *Europe*, and not exceeding 200 tons, ſhall be forfeited.

3. 21 *G.* 3. *c.* 39. gives a remedy to the owner of veſſels and goods forfeited againſt the maſter and mariners, if the forfeiture ariſes from their miſconduct.

4. 24 *G.* 3. *ſeſſ.* 2. *c.* 47. *ſ.* 1. If any veſſel ſhall be found at anchor or hovering within four leagues of the coaſt (unleſs by diſtreſs of weather) having on board foreign ſpirits in caſks of leſs than 60 gallons (except for the uſe of the ſeamen), or any wine in caſks (being leſs than 60 tons burthen) or any goods liable to forfeiture upon importation, ſuch goods, with the veſſel, ſhall be forfeited.

Sect. 2. Provided that evidence may be received to ſhew, from the ſmallneſs of the quantity and other circumſtances, that ſuch goods were on board without the privity of the owner.

Sequeſtration.

19 Vin. 326.

(B) In what Caſes; and how.

1. BILL againſt a ſequeſtrator during the vacancy of the church; whether the biſhop ought not to be a party? *Bunb.* 192. 1724. *Jones* v. *Barrett.*

2. In chancery, not only the body of the defendant, but all his lands and goods are liable to a ſequeſtration; but no ſequeſtration lies till the time for the return of the attachment is out, on which the body is taken. 3 *P. Wms.* 240. 1733. *Martin* v. *Merridge.*

3. After goods or a real eſtate are ſeized upon a ſequeſtration for want of an anſwer, the plaintiff may ſtill proceed till he has got the bill taken *pro confeſſo.* 2 *Atk.* 23. 1739. *Davis* v. *Davis.*

4. Where a defendant, for want of putting in his anſwer, has ſtood out the whole proceſs of contempt to a ſequeſtration, and the bill taken *pro confeſſo* on a decree againſt him *ad computandum*; the court will not diſcharge the ſequeſtration on paying the coſts of the contempt only, but will keep it on foot as a ſecurity to the plaintiff for the defendant's appearing before the Maſter to account. 3 *Atk.* 468. 1746. *Maynard* v. *Pomfret.*

5. Papers had been delivered out ſeveral years ago, for the purpoſe of being examined, and ſome time ſince an order had been obtained that they ſhould be reſtored; application had been made for the return, and refuſed. The order had been ſerved perſonally, but no writ of execution of the order had been ſerved or ſued out. A ſequeſtration *niſi* was granted on motion. 4 *Bro.* 434. 1785. In the matter of *Haſſenclever.*

6. Service of an order of ſequeſtration *niſi*, upon the clerk in court, is good; the plaintiff having tried in vain to ſerve it perſonally. 5 *Veſ. jun.* 113. 1799. *Marquis of Lothian* v. *Garforth.*

7. Query. Whether a ſequeſtration upon meſne proceſs can be executed farther than to pay the expences. 4 *Veſ. jun.* 735. 1799. *Simmonds* v. *Lord Kinnaird.*

8. The firſt motion for a ſequeſtration for non-payment of money is niſi. *Prac. Reg.* 391. 2d edition.

(C) Againſt what Perſons. 19 Vin. 328.

1. A ſequeſtration *niſi, &c.* was moved for againſt Mr. *Gambiere*, the warden of the *Fleet*, for not putting in his anſwer. *Moſely*, 238. 1729. *Anon.*

2. An attachment, for non-performance of an order, againſt one in the *Fleet*, is directed to the warden of the *Fleet*, and on his return, that he is his priſoner, you may move for a ſequeſtration. *Moſeley*, 301. *Hil.* 1729. *Anon.*

3. A ſequeſtration only goes where the defendant is in cuſtody of the warden of the *Fleet*, not of a ſheriff. 2 *Anſtr.* 579. *Trin.* 35 *G.* 3. *Markham* v. *Wilkinſon.*

(E) Of what Things. 19 Vin. 329.

1. A Writ of aſſiſtance granted for ſequeſtration where the ſequeſtrators had been oppoſed. *Bunb.* 168. 1724. *Granſlade* v. *Baker.*

2. He who obtains a ſequeſtration againſt a man injuriouſly diſpoſſeſſed, cannot by virtue of that title ſue the wrong-doer, for a right of action cannot be ſequeſtered. *Prac. Reg.* 2d edition, 386.

(F) Power of Sequeſtrators. 19 Vin. 331.

1. SEQUESTRATORS in caſe of contempt, for want of an anſwer, cannot remove the defendant's goods. *Bunb.* 272. 1729. *Deſbrow* v. *Crommie.*

2. Sequeſtrators having taken 11 hogſheads of cyder and other periſhable articles under a ſequeſtration for want of an anſwer; the court refuſed to order them to be ſold before the decree. *Ambl.* 421. 1762. *Wilcocks* v. *Wilcocks*, and *Hales* v. *Shafts*, 3 *Bro.* 72. S. P. 1 *Veſ. jun.* S. C. See 1 *Veſ.* 184. *contrà.*

3. There having been an order for the payment of money, and the party being in contempt for non-payment, and a ſequeſtration having iſſued, and goods being taken; the ſequeſtrators were ordered to ſell the goods. 3 *Bro. Ch. Rep.* 362. 1791. *Cavil* v. *Smith.*

4. Bill for an account taken *pro confeſſo* againſt the ſurviving executor and deviſee in truſt, and leaſehold eſtates were taken under a ſequeſtration for want of an anſwer; the court would not order the ſequeſtrators to ſell, but only directed them to apply the profits; and the court alſo ordered the dividends of money in the bank on the teſtator's account to be paid under the will, but could not order the bank to transfer before the act 36 *G.* 3. *c.* 90. 3 *Veſ. jun.* 22. 1795. *Shaw* v. *Wright.*

19 Vin. 332.

(G) Sequeſtration determined or ſet aſide.

1. A Sequeſtration muſt be returned before you can move to diſcharge it on the death of the party, as to lands. *Bunb.* 31. 1718. *Anon.*

2. No new ſequeſtration can be granted before the firſt is returned. *Bunb.* 62. 1720. *Yarroth* v. *Seys.*

3. Where a ſequeſtration iſſues as a mere proceſs, it falls with the death of the perſon; but if for non-performance of a decree, the death of the party does *not* determine it. 3 *Atk.* 594. 1747. *Hawkins* v. *Crook.*

4. If there be a ſequeſtration *niſi*, for want of an anſwer, againſt a member of parliament, and he puts in an anſwer before the order is made abſolute, and exceptions are taken to the anſwer, the court will *enlarge the time for ſhewing cauſe*, till it appears whether the anſwer is ſufficient, or not. 3 *Atk.* 742. 1751. *Butler* v. *Maſhfield.*

5. Appointment of a receiver diſcharges the ſequeſtration. 3 *Veſ. jun.* 22. 1796. *Shaw* v. *Wright.*

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19 Vin. 334.

Serjeant at Arms.

1. THE order for a ſerjeant at arms ſhall be drawn up by the regiſter, and delivered at the requeſt of the ſerjeant at arms to him or his deputy, and is not to be diſcharged, nor the contempt thereupon, without the ſerjeant's fees be paid, and a certificate under his hand teſtifying the ſame. *Ord.* Ch. 4 *Nov.* 26 *Ch.* 2. 13 *July*, 1 *Jac.* 2. 12 *July*, 6 *W.* 3.

2. It was ordered that where any perſon was in contempt, for want of an appearance or anſwer, or for not yielding obedience to any order or decree of the court of Chancery, (unleſs for contemptuous language, or the beating or abuſing any perſon in the ſervice of the proceſs of the court, or other contempts of a like nature,) the ſerjeant at arms ſhall apprehend and bring the contemner to the bar of the court, to anſwer ſuch contempt; but if the contemner cannot be found, then to return *non eſt inventus*, to the end that a ſequeſtration might regularly iſſue according to the ancient uſage and practice of the court. *Ord.* Ch. *May* 13, 7 *G.* 1.

3. It was ordered that it ſhould be made a part of all orders for giving time to anſwer, or for doing any other act, upon the party's entering an appearance with the regiſter; that the party when

when he enters ſuch appearance, ſhould likewiſe conſent that a ſerjeant at arms ſhould go againſt him, as upon a commiſſion of rebellion returned *non eſt inventus*, in caſe of non-compliance. *Ord. Ch. May* 13, 7 *G.* 1.

4. The order for a ſerjeant at arms being drawn up, paſſed, and entered, the clerk in court or ſolicitor gives it to that officer, who procures a warrant thereon, ſigned by the Lord Chancellor, and at the return thereof certifies in what manner he has acted under it. 1 *Harr.* 253.

5. The coſts are to be taxed by the clerk in court for the plaintiff and defendant, and are according to the diſtance the ſerjeant at arms has to ſeek the party; and the party taken upon this proceſs muſt clear his contempts, and pay his coſts before he can be releaſed; and, if it be in execution, he muſt be detained in cuſtody and brought into court, and upon motion, committed to the *Fleet* until he perform the decree. 1 *Harr.* 253.

6. Before a ſequeſtration can iſſue, a *non eſt inventus* muſt be returned by the ſerjeant at arms, unleſs the party be a peer or peereſs of the realm, a member of the houſe of commons, or an abſconding defendant proceeded againſt according to the ſtat. 5 *G.* 2. *c.* 25. in order that the court may be ſatisfied by its own officer that the contumacy of the defendant is wilful. *Prac. Reg.* 392. 2 edit.

7. The return which the ſerjeant at arms makes upon the back of the warrant muſt be filed at the report office before a ſequeſtration can iſſue. 3 *Atk.* 569. 1747. *Floyd* v. *Nangle.*

8. After a commiſſion of rebellion the next proceſs is a ſerjeant at arms, which is granted on motion, upon the return of *non eſt inventus* upon a commiſſion of rebellion.

9. And when a ſerjeant at arms is moved for, upon a commiſſion of rebellion returned, the commiſſion of rebellion is always produced, and is in the hands of the counſel who makes the motion, and he delivers it to the regiſter. 3 *Atk.* 570. *Ibid.*

Service of Rules and Orders, &c.

19 Vin. 335.

1. ORDERS for ſervice of ſubpœna are diſcretionary. 2 *Veſ.* 23. 1750. *Anon.*

2. Affidavit of the merits muſt accompany the motion for an injunction to ſtay proceedings when the plaintiff at law is abroad; but need not accompany the application that the ſervice of the ſubpœna on the attorney may be good ſervice. 3 *Bro. Ch. Rep.* 24. 1789. *Burke* v. *Vickars.*

3. When the defendants are beyond the juriſdiction of the court, ſervice of the ſubpœna on their clerk in court ſhall not be deemed

deemed good ſervice, though they have by that clerk in court filed a bill relative to the ſame ſubject. 3 *Bro. Ch. Rep.* 386. 1791. *Bond* v. *The Duke of Newcaſtle.*

4. Where there are cauſe and croſs cauſe, and the plaintiffs in the original cauſe are many, ſeveral of whom are out of the juriſdiction, and ſome peers, motion that ſervice on the clerk in court be good ſervice, refuſed; but the plaintiffs ſhall not proceed in the original cauſe till they have anſwered in the croſs cauſe. 3 *Bro. Ch. Rep.* 429. 1792. *Anderſon* v. *Lewis.*

5. Attachment ordered where the ſubpœna was ſerved abroad. 4 *Bro. Ch. Rep.* 213. 1793. *Scott* v. *Hough.*

6. Motion granted for an injunction, and receiver for one partner againſt another, the defendant being in contempt and ſerved perſonally and not appearing. 4 *Bro. Ch. Rep.* 441. 1793. *Read* v. *Bowers.*

7. Service at the laſt place of abode of defendant's wife ordered to be good ſervice. 5 *Veſ. jun.* 147. 1799. *Sir Wm. Pultney* v. *Shelton.*

8. Service by ſending the ſubpœna to the defendant under cover to the perſon to whom he had directed his letters to be ſent, ordered to be good ſervice. 5 *Veſ. jun.* 147. 1799. *Hunt* v. *Lever.*

For more of *Service of Rules, &c.* in general, ſee *Injunction, Subpœna*, and other proper titles.

Seſſions of the Peace.

19 Vin. 342. ## (E) Appeals. To what Seſſions they muſt be, and at what Time.

1. MOTION for a mandamus to compel the ſeſſions to receive an appeal from an order of removal. It appeared from the affidavits that the appeal was tendered at the ſeſſions enſuing the date of the order of removal; but no notice of appeal had been ſerved, as the appellants had not been able to get their witneſſes ready till it was too late to give notice. The court were of opinion that the juſtices ought to receive the appeal. Rule abſolute. *Rex* v. *The Juſtices of Glouceſterſhire, Dougl.* 182.

2. If from the diſtance between a pariſh to which the pauper has been removed to the place where the ſeſſions are held, there is not time to lodge an appeal at thoſe held immediately ſubſequent to the removal, the ſeſſions next enſuing are to be conſidered as the next ſeſſion within 13 & 14 *Car.* 2. and a *mandamus* will be granted to compel them to receive the appeal at ſuch

enſuing

enſuing ſeſſions. *Rex* v. *The Juſtices of the Eaſt Riding of Yorkſhire*, *Dougl.* 183. *Rex* v. *Juſtices of Wilts*, 2 *Bott* by *Conſt*, 838. *Pl.* 812.

3. So where a queſtion of appeal is ſubmitted to counſel, whoſe opinion is to be final, provided it be given before the next ſeſſions, and an objection to its being ſo is not ſtarted by the pariſh againſt whom it ſeems to be until after thoſe ſeſſions, the other pariſh may appeal to the enſuing ſeſſions. *Rex* v. *Juſtices of Devonſhire*, *Cald.* 32.

4. Appeal to the ſeſſions where it was not heard and there was no adjournment, at a new ſeſſions held within the ſame quarter, this appeal was allowed. The order of ſeſſions was quaſhed, as being made without juriſdiction. *Rex* v. *Polſtead*, *Stra.* 1263. *Rex* v. *Weſt Torrington*, S. P. *Burr. Seſſ. Caſ.* 293.

5. An appeal from an order of borough juſtices muſt be to the county ſeſſions, and the parties cannot cure this defect by acquieſcence in the juriſdiction. *Rex* v. *Eaſt Donyland*, *Burr. Seſſ. Caſ.* 592.

6. Where a general quarter ſeſſions quaſh an order of baſtardy, the court will not intend that a court of general quarter ſeſſions intervened between them and the time of making the juſtice's order, for every intendment is to be made to ſupport an order of juſtices, and the authority of *Rex* v. *Shaw*, *Salk.* 483. was denied. *Rex* v. *The Guardians of the Poor of Chicheſter*, 3 *Term Rep.* 496.

7. An order of removal is executed three days before the ſeſſions in a pariſh 20 miles from the place where they are holden, and there is no appeal to thoſe ſeſſions, the juſtices are not bound to receive one at the next. *Rex* v. *The Juſtices of Herefordſhire*, 3 *Term Rep.* 504.

8. The quarter ſeſſions are bound to receive an appeal to an order of removal although the ſervice of notice of it has been upon *Sunday*. *Rex* v. *Huntingdonſhire*, *Cald.* 283.

9. The juſtices of the quarter ſeſſions are not bound to enter and reſpite the hearing of an appeal againſt an order of removal to the enſuing ſeſſions, if they think that the appellants had ſufficient time to come prepared to try it and to give notice to the reſpondents. *Rex* v. *The Juſtices of the North Riding of Yorkſhire*, 3 *Term Rep.* 150.

10. An appeal *againſt a poor rate* muſt be lodged at the next ſeſſions after it is allowed. An order of ſeſſions diſmiſſing an appeal on this account was confirmed in *B. R.* without argument on the authority of *Rex* v. *Penryn*, *Trin.* 24 *G.* 3. *B. R.* (1), and *Rex* v. *Michlefield*, *Hil.* 25 *G.* 3. *B. R.* (2). *Rex* v. *James Atkyns*, 4 *Term Rep.* 12.

(1) Reported by the name of Rex v. Coode

1 Bott by Conſt, 236. pl. 240. (2) 1 Bott by Conſt, 239. pl. 241.

19 Vin. 345. (R) Of their ſtating Caſes for the Opinion of the Court of *K. B.*

1. ON an appeal the ſeſſions confirm the order and refuſe to ſtate a caſe. The counſel for the appellants excepted to their refuſal, and deliver into court a bill of exceptions under their hands, which was received. On the removal of the orders and the exceptions, the court were inclined to come at the caſe, as the determination of the juſtices was contrary to law, but refuſed a rule to ſhew cauſe why the orders ſhould not be quaſhed. For the juſtices cannot be compelled to ſtate a caſe, and that which is ſtated to be ſo in the exceptions we cannot take as granted to be the fact. *Rex* v. *Owlton*, *Burr. Seſſ. Caſ.* 64. 2 *Seſſ. Caſ.* No. 179.

2. In *Rex* v. *Preſton upon the Hill*, S. P. that no bill of exceptions lies in this caſe to the court of quarter ſeſſions. *Burr. Seſſ. Caſ.* 77. *Stra.* 1040. 2 *Seſſ. Caſ.* No. 172. *Caſ. temp. Hardw.* 249.

3. The fact of fraud muſt be found poſitively by the ſeſſions, for the court will not infer it from the evidence. *Rex* v. *Weſton*, 2 *Stra.* 1156.

4. *Sed Qu.* Whether, when the ſeſſions have ſtated all the facts particularly, and drawn a concluſion of fraud from thoſe facts, the court of K. B. have a right to examine into the propriety of that concluſion. *Rex* v. *Woodland*, 1 *Term Rep.* 261.

5. Where a caſe is inſufficiently ſtated the court of K. B. ſend it back to the ſeſſions to be re-ſtated. 3 *Burn. Juſt.* 606.

6. The court will not ſend a caſe to be re-ſtated becauſe the ſeſſions have improperly rejected hearſay evidence. *Rex* v. *Nutley*, *Eaſt.* 12 *G.* 3. 2 *Bott* by *Conſt*, 856. *pl.* 835.

7. Neither will they ſend it upon the affidavit of a perſon (eſpecially if intereſted) that the clerk of the peace did not ſtate his evidence truly. *Rex* v. *Burgh*, *Hil.* 13 *G.* 3. 2 *Bott* by *Conſt*, 860. *pl.* 836.

8. But whether the juſtices at the 2d ſeſſions are obliged to hear evidence depends upon the nature of the caſe; if it be ſent back merely to cure an informality in it, they need not. *Rex* v. *Bray*, *Burr. Seſſ. Caſ.* 682.

9. If new evidence be neceſſary to eſtabliſh the facts, they muſt do ſo. *Rex* v. *Page*, *Ib.* 685. 2 *Bott* by *Conſt*, 853. *pl.* 833.

10. If a ſeſſions be adjourned pending the ſettlement of a ſpecial caſe, the court will grant a mandamus commanding the ſeſſions to complete it. *Rex* v. *Juſtices of Suſſex*, *Mich.* 9 *G.* 3. 2 *Bott* by *Conſt*, 862. *pl.* 841.

11. An order being removed into *B. R.* by *certiorari*, and no caſe ſtated by the ſeſſions, the court ordered the ſeſſions to examine into and certify the number of the churchwardens and oveſeers of the poor of that pariſh at the time of granting the certificate. *Rex* v. *Margam*, 1 *Term Rep.* 775.

(N) Coſts upon Appeal.

19 Vin. 350.

1. A mandamus was granted for the juſtices to give coſts to the party in whoſe favour the appeal had been determined, but on the return of it the court held it reaſonable that the ſeſſions ſhould have the power of judging whether coſts ſhall be allowed and quaſhed the writ. *Rex* v. *The Juſtices of Nottingham*, *Neſſ. Juſtice*, tit. *Poor*. 2 *Bott* by *Conſt*, 861. *pl.* 845.

2. Where the ſeſſions gave coſts on an adjournment of an appeal the court quaſhed that part of the order. *Rex* v. *Stansfield*, *Burr. Seſſ. Caſ.* 205.

3. On an appeal againſt an appointment of an overſeer it was confirmed with coſts; and held *per cur.* that the ſeſſions could give coſts in this caſe under 17 *G.* 2. *c.* 38. *ſ.* 4. *Rex* v. *R. Morris*, 4 *Term Rep.* 550. *Nol. Rep.* 31.

4. Defendant was indicted for not paying 20*l.* coſts upon the diſmiſſion of his appeal againſt a poor rate; it was objected on demurrer, 1ſt, That this was not an indictable offence. 2d, That 17 *G.* 2. gives a remedy by diſtreſs. 3d, That it is not ſtated that the defendant is an inhabitant. 4th, That the act does not extend to inferior juriſdictions, in one of which the preſent order was made. But they were over-ruled. *Rex* v. *Byce*, 1 *Bott* by *Conſt*, 288. *pl.* 327.

Coſts in *B. R.*

1. WHERE the order of ſeſſions is ſent back to be re-ſtated, and is returned amended; the pariſh objecting to it as it originally ſtood, ought not to pay coſts, and the court will diſcharge their recognizance. *Rex* v. *Hitcham*, *Burr. Seſſ. Caſ.* 504. *Rex* v. *Bray*, *Ib.* 682.

2. But where a pariſh does not abandon the queſtion, but takes the chance of the judgment of the court upon the caſe as re-ſtated, they muſt pay coſts. *Rex* v. *Edgeworth*, 4 *Term Rep.* 218.

Settlements in Chancery.

19 Vin. 359. (A) Settlements of Land by Chancery, &c. What Limitations Chancery, &c. will direct.

1. MRS. *Sidney* brought her bill againſt her huſband, to have a ſpecific performance of her marriage articles, *dated the* 17th *October* 1716, whereby he covenanted, that within eight months after ſhe ſhould come of age, he would convey his eſtate in *Glamorganſhire* to truſtees to the uſe of himſelf for life, remainder to the uſe of truſtees to ſupport contingent remainders, remainder to the uſe of his wife for her life for her jointure, remainder to their ſons ſucceſſively in tail male, remainder to the daughters in tail, remainder to himſelf in fee; the wife alſo covenanted that ſhe would, within eight months after ſhe came of age, convey her eſtate to the uſe and intent that ſhe ſhould be paid thereout 100*l. per annum* for her ſeparate uſe, 100*l.* to her mother, and 50*l. per annum* to her ſiſter till ſhe ſhould come of age, and then ſhe was to be paid 1000*l.*; and alſo that her eſtate thus charged ſhould be conveyed to the uſe of her huſband for life, remainder to the uſe of the wife for life, remainder to the uſe of the firſt, &c. ſon in tail male, remainder to the daughters in tail, remainder to her right heirs. The timber on her eſtate to be applied to pay off a mortgage of 5000*l.* on the huſband's eſtate; and the ſurplus of the money, ariſing by the ſale of the timber, to go to raiſe portions for younger children. The bill was to compel the huſband to perform his part of the articles, and that he might account for the timber he had cut down from the wife's eſtate, which was decreed accordingly; and the court ſaid that the wife's having eloped, and living with an adulterer, was no bar to the demand. 3 *P. Wms.* 269. 1734. *Sidney* v. *Sidney.*

The original bill was filed by truſtees in marriage articles, and the children of the marriage againſt the huſband and the wife, and the croſs-bill by the huſband againſt the wife and children. The original bill prayed a performance of the articles, and the huſband, by his anſwer to the original bill, and by the croſs-bill, reſiſted the performance, ſo far as the articles made a proviſion for the wife, alleging and proving in the cauſe, that ſhe lived ſeparate from him in adultery. The court was of opinion, that this was not a reaſon for non-performance of the articles as to the wife, and made a decree accordingly in the original cauſe, and diſmiſſed the croſs-bill without coſts. 3 P. Wms. 277. in notis. 1781. Blount v. Winter.

2. By ſettlement before marriage, ſecurities for money belonging to the wife were aſſigned to a truſtee to be laid out in the purchaſe of freehold lands, and ſettled among other uſes, to the firſt ſon in tail male, with like remainders to the ſecond and other ſons, remainders to the heirs female in tail. The father and mother

die, leaving the *plaintiff*, two other ſons, and four daughters. The eldeſt ſon now prays by his bill, that the ſecurities may be aſſigned to him, being tenant in tail, and not laid out in land, which by conſent was ordered, and it was ſaid to be the rule to order the money to be laid out in land to give the remainder-man his chance. 1 *Atk.* 11. 1749. *Collet* v. *Collet.*

3. By ſettlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of the grantor's term, in truſt, to raiſe an annuity for the lives of the wife, and her mother and the ſurvivor; then reciting that the remainder of the term might expire in the life of the wife or her children; therefore, to make a proviſion for her and her children by her then or any future huſband, the truſtees ſhould be poſſeſſed of the ſaid tolls for the remainder of the term upon truſt, to raiſe, after the deaths of the grantor and the mother of the wife, 100*l.* annually, to be placed out in the purchaſe of freehold lands or hereditaments, or leaſehold eſtates for two or three lives, as often as a competent ſum ſhould be raiſed for that purpoſe; and, until convenient purchaſes ſhould offer, to be inveſted in government ſecurities, upon truſt, in caſe the wife ſhould ſurvive the term, to pay the rents and profits of ſuch eſtate or eſtates ſo to be purchaſed, or the intereſt, produce, and profits to ariſe from the money ſo intended to be placed out, until ſuch purchaſe ſhould be made to the wife for life, and after her deceaſe to apply the ſaid rents and profits, or intereſt money, towards the ſupport and maintenance of ſuch child and children of her as ſhould be living at her death, till the youngeſt ſhould be 21; and then to be poſſeſſed of ſuch eſtates ſo to be purchaſed, or of the money ariſing from the annuity not placed out in one or more purchaſe or purchaſes to the uſe of ſuch child or children, in ſuch ſhares and proportions, payable at 21, as the ſurvivor of the huſband and wife ſhould by will or deed direct, limit, and appoint; in default thereof, to the uſe of all ſuch children equally to be divided at their reſpective ages of 21; but if ſhe ſhould die without leaving any child or children, or all ſhould die under 21, then to the uſe of the grantor, his heirs, executors, adminiſtrators, and aſſigns, and after paying the ſaid annuities, to be poſſeſſed of all the ſurplus money ariſing from the ſaid tolls during the remainder of the term, for the uſe of the grantor, his executors, *&c.* From the death of the grantor, who ſurvived the wife's mother, the truſtees received 100*l.* a-year, and laid out in ſtock the ſums received, and the produce. One ſon was the only iſſue, he attained 21 in the life of his mother, and ſurvived her. The court would not inveſt the fund in land, but held it, with the accumulations from the death of the grantor and the future payments, a veſted intereſt in the ſon at 21, and as perſonal eſtate belonging to his adminiſtrator. 3 *Veſ. jun.* 41. 1796. *Swann* v. *Fonnereau.*

19 Vin. 364. (C) Uſes in Settlements relieved againſt in Chancery.

1. BY articles before marriage, an eſtate is agreed to be ſettled on the huſband for life, *ſans waſte*, remainder to the heirs male of his body, with power to raiſe portions for younger children. A ſettlement is afterwards made, alſo before marriage, in purſuance of the articles, and obſerving the very words of the articles. The huſband levies a fine, declaring the uſes to himſelf in fee, and by his will makes a proviſion to truſtees for payment of his ſon's debts; for which purpoſe they were to make propoſals to his creditors. The truſtees file a bill, to which the ſon was made a party, againſt the ſon's creditors, to elect whether they would accept the propoſals or not; in conſequence of which a decree is made. The ſon brought his bill to have the ſettlement rectified according to the intention of the articles, which was to make the father tenant for life only, although the words both of the articles and ſettlement in conſtruction of law made him tenant in tail, which was granted accordingly, but as he had taken a benefit under his father's will, he muſt be put to his election. 1 *Veſ.* 239. 1749. *Roberts* v. *Mingsly*.

2. The court refuſed to rectify a ſettlement, which varied the intereſt of an adult from what it appeared to be under the articles to his diſadvantage, unleſs where it was clearly intended that the ſettlement ſhould purſue the articles, ſaying that almoſt all the caſes which had been determined on that head were of ſettlements in prejudice of the iſſue of the marriage; and there could be no preſumption of a new agreement. *Ambl.* 315. 1756. *Partyn* v. *Roberts*.

3. Marriage ſettlement not altered in favour of the intention, the recital being too general, and nothing *dehors* the words to do it by. 1 *Veſ. jun.* 57. 1789. *Doran* v. *Roſs*. So in *Smith* v. *Maitland*, *Ibid.* 362. reſpecting a miſtake in a will.

4. But where the intention was declared in the recital of a ſettlement, it was reformed according to ſuch intention. 1 *Veſ. jun.* 171. 1790. *Payne* v. *Collier*.

For more of *Settlements* in general, ſee *Agreements*, *Marriage*, *Uſes*, and other proper Titles.

Settlement of the Poor.

Of Perſons having no Settlement. 19 Vin. 365.

1. DOCTOR *Burn* ſeems of opinion that *Iriſhmen* and *Scotchmen*, if they are able to maintain themſelves, and commit no act of vagrancy, cannot be removed, and therefore may eaſily gain ſettlements for their children born here, their ſervants and apprentices.

2. He is alſo of opinion that if they reſide in a tenement under 10*l.* in yearly value, being unremoveable, they may gain a ſettlement themſelves by publiſhing notice in the church purſuant to the 1 *Jac.* 2.

3. If on the other hand, the 13 & 14 *Car.* 2. extends only to the native poor of *England* and *Wales*, by his opinion they can neither gain a ſettlement in *England* by virtue of this ſtatute nor any of the ſubſeqent ones, all of which depend upon it. But he thinks this to be in contradiction to univerſal practice. 3 *Burn*, 335. 16 edit.

(A) By Birth. Of Baſtards. 19 Vin. 365.

1. A Baſtard born under an order of removal before the mother can be ſent to her place of ſettlement, being hindered by water or otherwiſe, is ſettled at the mother's ſettlement. *Ickleford and Great Milton*, 1 *Seſſ. Caſ.* 33. *Caſes of S. and Rem.* 66.

2. So if ſhe be delivered while the officers are carrying her by virtue of the order. *Jane Gray's* caſe. *Caſes of S. and Rem.* 66.

3. By 17 *G.* 2. *c.* 5. *ſ.* 25. where a woman *wandering and begging* is delivered of a child in a pariſh or place to which ſhe don't belong, the churchwardens and overſeers may detain her till they can convey her to a juſtice of peace, in which caſe the child, if a baſtard, ſhall not be ſettled at the place where born, but at the ſettlement of the woman.

4. A baſtard born on the road while the mother is endeavouring to reach her own pariſh without fraud, is ſettled where born. *Rex* v. *Aſtley*, *Bott* by *Conſt*, 2. vol. 10.

5. By 13 *G.* 3. *c.* 82. a baſtard born in a lying-in hoſpital ſhall follow the ſettlement of its mother.

6. A baſtard born in a county gaol, where the mother had been committed for ſafe cuſtody, is not ſettled where born. *Elſing* v. *The County of Hereford*, 1 *Seſſ. Caſ.* 99.

7. By 20 *G.* 3. *c.* 36. baſtards born in the houſe of induſtry of any hundred or other diſtrict incorporated by act of parliament for the relief and employment of the poor, ſhall be deemed to belong to the place where the mother was ſettled.

8. A ſingle woman went to the pariſh of *Lydlinch* under a certificate from *Helton*, lived there a year and then had a baſtard child. The court were of opinion that this child was ſettled where born. That the queſtion turned upon this, whether a baſtard is included under the words "*children or family*," in the 8 & 9 *W.* 3. *c.* 30. which they thought meant merely legitimate children. *Helton and Lydlinch*, *Burr. Seſſ. Caſ.* 187. *Stra.* 1168. 2 *Seſſ. Caſ.* 249. edit. 1750. and in *New Windſor and White Waltham*, *Stra.* 186. S. P.

9. So where *Sarah Cotton* being pregnant with a baſtard child, came under a certificate from *Shelfe* to *Hipperholme*, where the child was born, the ſettlement of the child was adjudged to be in *Hipperholme*, although the certificate undertook *to provide for her and her child* whenever they ſhould become chargeable, for the court will underſtand the certificate to refer to a legitimate child then in being, as it dont appear that the pariſh certifying knew that the woman was with child at the time it was granted. *Rex* v. *The Inhabitants of Wyke*, *Burr. Seſſ. Caſ.* 264. 2 *Seſſ. Caſ.* edit. 1750. 369.

10. But where a woman went to *Ipſley* under a certificate from *Studley*, acknowledging "Ann Cauſur, *ſpinſter, and the child or children that ſhe now goeth with*," to be ſettled there, the court were of opinion, that the pariſh was bound by their certificate, and that the after-born baſtard was ſettled in *Studley*. *Rex* v. *Ipſley*, *Burr. Seſſ. Caſ.* 650.

11. Where a woman and her baſtard child have different ſettlements they cannot be ſeparated until the child is ſeven years old. *Skeffreth and Walford*, 2 *Seſſ. Caſ.* 90.

12. But it muſt be maintained by the pariſh in which it is ſettled. *Dougl.* 9. *Cald. Caſ.* 6.

13. A baſtard, although within the age of nurture, may be ſent to its ſettlement, if the mother deſert it. 3 *Burn's Juſt.* 363.

14. The evidence of the putative father is admiſſible to prove the baſtardy of the children after the death of their mother, although they were reputed as man and wife, for he does not ſwear to diſcharge himſelf. *Rex* v. *Inhabitants of St. Peter's*, *Burr. Seſſ. Caſ.* 25. 2 *Seſſ. Caſ.* ed. 1750. 298.

15. But that he ſhall not be received to prove it againſt the preſumption of 30 years cohabitation. *Rex* v. *Stockland*, *Burr. Seſſ. Caſ.* 508.

16. If, from the facts ſtated in an order of removal, it appears by fair concluſion that a child is a *baſtard*, he ſhall be ſettled where he is born. *Rex* v. *Lubbenham*, 4 *Term Rep.* 251.

2. By Birth of Legitimate Children.

1. IF the father hath no ſettlement, or it is not known, yet if the mother hath a ſettlement, the child ſhall be ſent thither. 3 *Burn*, 365.

2. The ſettlement by birth may be proved by the copy of the pariſh regiſter of chriſtenings, and by identifying the perſon. *Rex* v. *Creech St. Michael's*, *Burr. Seſſ. Caſ.* 765.

3. The birth of a pauper, removed as a perſon who had been married, is ſufficient *prima facie* evidence of the ſettlement to oblige the other ſide to go on. *Rex* v. *Woodford*, 2 *Bott* by *Conſt*, 16. *pl.* 35.

4. The place of birth of a legitimate child ſhall be taken to be the place of its ſettlement, although it appears that his father is ſtill living and had ſerved two years in a different pariſh; for *non conſtat* that the ſervice was under a hiring for a year. *Rex* v. *Whixley*, 2 *Bott* by *Conſt*, 17. *pl.* 36.

5. By 13 *G.* 2. *c.* 29. no child nurſe or ſervant, received or employed in the hoſpital for the maintenance and education of expoſed and deſerted young children, ſhall, by virtue thereof, gain any ſettlement in the pariſh where ſuch hoſpital ſhall be ſituate.

6. The ſettlement of foundlings, therefore, if legitimate, differs not from that of other perſons who are ſo. If baſtards, their ſettlement is where they were born, if known, but if unknown, they are taken off the pariſh and left to the proviſion of the hoſpital. 3 *Burn.* 365-6.

(D) By having, &c. Land or Houſe, &c. 19 Vin. 370.

1. A Boy had an eſtate of 4*l.* a-year in fee; he is not removable from it, and therefore gains a ſettlement where it is ſituated, and it is not material *quo animo* he came there, or whether he reſided actually upon it. *Rex* v. *Haſfield*, *Burr. Seſſ. Caſ.* 147. *Stra.* 1131.

2. Demiſe of a cottage for 99 years, at 5*s.* a-year, being the full value. The leſſee deviſed it to his ſon, who is his executor; the ſon gains a ſettlement by inhabiting it. *Rex* v. *Sundriſh*, *Burr. Seſſ. Caſ.* 7. *Seſſ. Caſ.* No. 200. *Stra.* 983.

3. A cottage was demiſed, in conſideration of 14 guineas, to the huſband for 99 years, at 2*s.* annual rent. He died, leaving a widow and children. The widow, having reſided ſome time, ſold and aſſigned the reſidue of the term, *and afterwards ſued out letters of adminiſtration to her huſband's effects.* It was argued that there was a difference between a ſole next of kin, and where ſeveral perſons in equal degree have an equal right; that the widow having, before adminiſtration, a ſpecific right in the thing, could not be removable and gained a ſettlement by a reſidence of 40 days; that

there was only a ceremony to make the aſſignment by her indefeaſible, which diſtinguiſhed this caſe from *Faringdon* and *Widworthy*, where the pauper was only entitled to the adminiſtration jointly with his brother. The court thought that ſhe gained no ſettlement, for *per* Lord *Mansfield*—This caſe does not differ materially from that of *Widworthy*; as the children were entitled to two thirds of the effects, the widow is not properly and in the ſenſe of the caſes, the ſole next of kin. *Rex* v. *Northcurry*, *Cald.* 137. *Vid. South Sydenham* v. *Lamerton*, *Sett. & Rem.* 107.

Vid. 19 Vin. Abr. 372. pl. 2.

4. The pauper built a cottage on a waſte without leave, lived there 19 years and an half, but paid no taxes and was not rated; he was then turned out of poſſeſſion by an ejectment brought by his mortgagees, and after 20 years is was ſold by them. *Per cur.* The mortgagee's poſſeſſion muſt be conſidered as the pauper's, who was therefore in adverſe poſſeſſion 20 years, and gains a ſettlement. *Rex* v. *Bitton*, *Burr. Seſſ. Caſ.* 631.

5. So where the father lived in a cottage built on a waſte for 30 years, without making any acknowledgment to the lord of the manor, he gains a ſettlement. *Sed vid.* that the order was quaſhed without defence. *Rex* v. *Garway*, *Burr. Seſſ. Caſ.* 632.

6. The pauper married a woman who had been three years in poſſeſſion of a houſe and garden, which had been given her by deed by one *T. W.*, who had been the owner of the premiſes for upwards of 30 years before, and he and his wife lived in it 17 years afterwards, neither paying rent nor interrupted in the enjoyment by the lord of the manor or any other perſon, he gains a ſettlement. For the ſtat. 9 *G.* 1. *c.* 7. is confined to caſes where the conſideration is paid in money. *Rex* v. *Brungwyn*. *Hil.* 13 *G.* 3. 2 *Bott* by *Conſt*, 637. *pl.* 567.

7. The pauper's mother, having been in poſſeſſion of a leaſe of a cottage and garden for 99 years, died; the pauper ſurrendered it, and, paying 30*s.* to the lady of the manor, he took a new leaſe of it for the ſame term, with a ſmall piece of the waſte of the manor which adjoined it. This is not a purchaſe within 9 *G.* 1. *c.* 7. and will not prevent a ſettlement being acquired by reſidence. *Rex* v. *Tarrant*, *Cald.* 209.

8. The pauper's grandmother, being poſſeſſed of an eſtate for years, determinable on his mother's life, and of ſome other effects, deviſed 19*l.* a-year to him *out of her eſtate*, during the life of his ſaid mother. The pauper being in debt, to avoid his creditors, went and reſided with his mother upwards of 40 days on this eſtate, and while the annuity was payable. *Per* Lord *Mansfield*. There is no colour for his gaining a ſettlement by this. He did not go thither to reſide on his own, but to avoid his creditors. This was no ſpecific legacy, but payable out of the whole eſtate. But if it were a ſpecific legacy, a ſpecific legatee has no right to go and live upon the eſtate. If it had been a rent charge out of a freehold, he could not. *Rex* v. *Stockley Pomroy*, *Burr. Seſſ. Caſ.* 762.

9. The widow reſides ſeven years in an houſe and orchard, of which her huſband died ſeiſed. No dower is aſſigned. She marries

ſes again, and her ſecond huſband reſides on the lands above 40 days. This mere right of dower is not ſufficient to gain a ſettlement for her ſecond huſband and the children ſhe had by him, but as by *magna charta* ſhe had a right to remain 40 days in the houſe, and to have eſtovers, ſhe might, by reſidence for that time, have a claim to a ſettlement there for herſelf. *Rex* v. *Painſwick, Burr. Seſſ. Caſ.* 783.

Vide Rex v. Long Wittenham, 2 Bott, 41. pl. 68. S. P.

10. Deviſe to a wife during her widowood, and after the determination thereof, to truſtees, to ſell and divide the money among his children, of whom the pauper's wife was one. The widow let all the eſtate, except a dwelling-houſe worth 20*s.*; the pauper with his wife lived with *her* mother till her death, and afterwards continued in poſſeſſion of part of the dwelling houſe, which ſhe had permitted them to live in. In a month after the death, the truſtees contracted to ſell the eſtate, and in five months after executed the conveyance. The pauper paid no rent to his mother-in-law. *Gould* J. to whom the caſe was referred, as being the judge of aſſize, was of opinion he gained a ſettlement by this reſidence; and Lord *Mansfield* intimated that as adviſed at preſent he was of the ſame opinion; but declared, that the caſe having been referred to the judge with the conſent of all parties, his deciſion ought to be final. *Rex* v. *Natland, Burr. Seſſ. Caſ.* 793. *Vid.* the opinion of *Willis* J. *Rex* v. *Wivelingham, Dougl.* 738. *Cald.* 121.

11. A huſband gains a ſettlement by reſiding on an eſtate veſted in truſtees for the ſeparate uſe of the wife. *Rex* v. *Offchurch*, 3 *Term Rep.* 114.

12. The pauper, being inſolvent, conveyed two freehold houſes to truſtees to ſell and pay his debts; the ſurplus, if any, to be to him, his executors, &c. The truſtees, having poſſeſſion of one of them, gave the key to a ſervant, and the pauper's wife took it from where ſhe left it without her conſent, and then the pauper and his family reſided there above a year without the truſtees' or creditors' conſent. He gains no ſettlement; for by Lord *Mansfield*, the eſtate is not ſubſtantially his property; he had conveyed his intereſt, and had only a chance of a reſidue. But there is a ſtronger ground; the poſſeſſion was obtained by fraud. *Rex* v. *St. Michael's, Bath, Dougl.* 608. *Cald.* 110.

13. The mortgagee of ſeveral houſes recovered poſſeſſion of them in ejectment; afterwards the mortgagor obtained permiſſion of the agent to reſide in one of them for the purpoſe of inſpecting repairs, that they might be ſold to pay off the mortgage money, and reſided in it three months. *Per cur.* He gains no ſettlement, for he neither had *jus in re* nor *ad rem*. *Rex* v. *Catherington*, 3 *Term Rep.* 771.

14. A woman, previous to her marriage with a copyholder of a manor, where the widows of huſbands who die ſeiſed are entitled to their free bench, gave a bond to *T. G.*, the ſon-in-law of her intended huſband, that he and his wife ſhould have poſſeſſion

of part of the copyhold eſtate after the death of her huſband, on condition of his repairing that part of the houſe reſerved for her, giving her certain furniture, and making her a certain quantity of cyder annually. Afterwards ſhe delivered up the poſſeſſion on the death of her huſband, and the ſon reſided there above 14 years. It was argued, that no intereſt paſſed to *T. G.*, and therefore that he gained no ſettlement, for the widow was not ſeiſed of the eſtate at the time of entering into the bond. 2dly, That there was no conſideration to her to enter into it, the wife of *T. G.* not being his child; and therefore there was no equitable intereſt which would entitle the poſſeſſor to a conveyance of the legal title by a bill in equity, which is the only caſe of an equitable intereſt in which reſidence will give a ſettlement. But *per cur.* a court of equity would compel a ſpecific performance, for this bond was given in conſideration of marriage, certain benefits were reſerved to her by it, and the huſband might have defeated her claim if he had choſen, by parting with the poſſeſſion of the land before he died. Then we muſt take it that he held the eſtate till his death on the faith that ſhe would afterwards deliver up the poſſeſſion. But what is more deciſive is, that ſhe had delivered up the poſſeſſion, and the ſon-in-law had a good title againſt all the world but the widow, nay againſt her ſo far that ſhe could not recover in ejectment; ſo that he had the poſſeſſion, and no perſon could recover the eſtate from him. *Rex* v. *Lopen*, 2 *Term Rep.* 577.

15. The father purchaſes a tenement for a conſideration leſs than 30*l.*; the ſon, who is born there, gains no ſettlement; for the father having no ſettlement there, but being merely irremovable from his own eſtate, no derivative ſettlement can be gained through him. *Rex* v. *Salford*, *Burr. Seſſ. Caſ.* 516. 1 *Black. Rep.* 433. 455.

16. The pauper purchaſed a tenement for 12*l.*, and was by name rated to and paid the land tax and poor rate; he gains a ſettlement. *Rex* v. *Uffaulme*, *Burr. Seſſ. Caſ.* 430.

17. A perſon, ſeiſed of a copyhold worth 25*s.* a-year, ſurrendered to his ſon, who dwelt in it a year and then ſold it for 14*l.* which was its value. It was thought he gained no ſettlement, for the intent of 9 *G.* 1. *c.* 7. was to prevent perſons gaining ſettlements who were likely to be chargeable, and therefore provided that they ſhould be able to lay out 30*l.* in a purchaſe. *Rex* v. *Sabridgeworth*, 2 *Seſſ. Caſ.* 161. 1 *Barnardiſt.* 297. *Burr. Seſſ. Caſ.* 56.

18. But where a father, in conſideration of love and affection, conveyed to his daughter, being the pauper's wife, a tenement for the reſidue of 99 years, determinable on lives, the original purchaſe-money of the leaſe being only 20*s.*, the court were of opinion that this was not a *purchaſe* within the meaning of the act, for that word is not to be taken *in its largeſt extent, but is confined to caſes where a pecuniary conſideration is paid*; that the pauper's huſband was not to be conſidered as a purchaſer here,

and

and therefore gained a ſettlement. *Rex* v. *Marwood, Burr. Seſſ. Caſ.* 386. *Say.* 268.

19. The father of the pauper's wife, ſoon after his marriage, by deed, ſtating a conſideration of natural love end affection, and 10*s.* conveyed to the huſband, his heirs, and aſſigns, a piece of ground of the value of a guinea, to hold to the pauper and his wife, their heirs and aſſigns, and to their uſe for ever; livery of ſeiſin was indorſed on the deed. It appeared in evidence, that though 10*s.* were mentioned in the deed, no money was paid, but on the contrary, that the father offered to give the ground for his ſon-in-law and his wife to build an houſe to live in, and promiſed to do all the carpenter's work *gratis*. There had been no promiſe or agreement before marriage to convey it. This is not a purchaſe within 9 *G.* 1. *c.* 7. *ſ.* 5. *Rex* v. *Charleton, Eaſt.* 24 *G.* 3. 2 *Bott* by *Conſt*, 647. *pl.* 576.

20. A father, in conſideration of natural love and affection, and 10*l.* paid him by his ſon, conveys a cottage to him in fee. The ſon gains a ſettlement by reſidence, for *per cur.* we are bound to notice that the conveyance was in conſideration of natural love and affection as well as 10*l.* We can't therefore ſuppoſe that to be the value of the eſtate, ſince it ſold afterwards for 50*l.* It is a donation from a father to a ſon, and not a purchaſe within 9 *G.* 1. *c.* 7. *Rex* v. *Ufton*, 3 *Term Rep.* 251.

21. Same point as to the voluntary ſettlement of a cuſtomary tenement, the pauper reſiding under a certificate. *Rex* v. *Ingleton, Burr. Seſſ. Caſ.* 560. *Vid.* the opinion of *Buller* J. *Rex* v. *Warblington*, 1 *Term Rep.* 249.

22. A woman purchaſes a leaſehold tenement for leſs than 30*l.* then marries, and her huſband, having reſided more than 40 days, dies. The huſband, having *had this eſtate veſted in him by marriage*, gained a ſettlement, which was communicated to the wife. *Rex* v. *Ilmington, Burr. Seſſ. Caſ.* 566. *Black.* 598.

23. The pauper came under a certificate to the pariſh of *H.*, where the lord of the manor granted to him and his heirs a parcel of waſte ground by copy of court roll, which did not appear to have been granted before. It appeared by the court books, that he had been admitted, and in the copy of his admiſſion were theſe words, "*fine, one ſhilling, heriot, one ſhilling, quit rent, one ſhilling.*" The ſteward of the manor proved that the lord was uſed to grant parcels of the waſte for pecuniary conſiderations, but never without. The value of the land, at the time of the grant, did not exceed 30*s.* The court were of opinion that it was incumbent on the appellants, who wiſhed to get rid of the certificate, to ſatisfy the ſeſſions that this was a voluntary grant, and not having done ſo, they can't impeach the order, ſince not being wrong on the face of it, they court muſt take it to be right. They thought alſo that ſufficient appeared in the caſe to ſhew *that this was a purchaſe*. But they gave no opinion whether a voluntary grant of land under the value of 30*l.* will diſcharge the certificate, and give the pauper a ſettlement. *Rex* v. *Warblington*, 1 *Term Rep.* 241.

24. The

24. The pauper purchaſed a tenement for 39*l.*, paid 9*l.* himſelf, and borrowed the reſt from *B.*, to whom he mortgaged the premiſes as a ſecurity. Having continued in poſſeſſion four years, *B.* entered by virtue of the mortgage and a releaſe of the equity of redemption. The juſtices adjudge this purchaſe to be fraudulent, and the pauper not to gain a ſettlement; but the court of King's Bench were of opinion that this was not within 9 *G.* 1. *c.* 7., for 39*l.* was *bonâ fide* paid to the vendor, and the juſtices had no power upon that act to inquire whether he borrowed the money. 2d. That the juſtices have authority to conſider whether the purchaſe was fraudulent, for that infects the whole, and makes it no purchaſe. But though the court are bound by the concluſion of the juſtices, where they find *fraud generally*, yet where they ſtate facts the matter is open for the court's determination, and they may draw a different concluſion. This is no fraudulent purchaſe, and the pauper gained a ſettlement by it. *Rex* v. *Tedford*, *Burr. Seſſ. Caſ.* 57. 2 *Stra.* 1014. *Seſſ. Caſ.* No. 164.

25. The pauper had a term in mortgage for leſs than 30*l.*, but was owed by the mortgagor a ſimple contract debt, which made his whole demand more. On the death of the mortgagor, he took out adminiſtration as principal creditor, entered, and was poſſeſſed above 40 days. He gains a ſettlement as a purchaſer for a conſideration of more than 30*l.* *Rex* v. *Stockland*, *Stra.* 1162. *Burr. Seſſ. Caſ.* 169.

26. A term of years in a cottage is deviſed to a ſon, with a declaration *that the father* (who lived in the pariſh under a certificate) *and his children* ſhould have liberty to dwell there during their life. *The children* gain a ſettlement there. *Rex* v. *Woburn*, *Burr. Seſſ. Caſ.* 785.

27. *A.*, reſiding in a cottage of his own, granted it by leaſe and releaſe to his ſon-in-law in fee, in conſideration of 36*l.*, with a proviſo "that *A.* ſhall live and *occupy* the ſaid cottage with the appurtenances, *as he heretofore had done and then did for life.*" *A.* has an eſtate for life, and the ſon has only a remainder, which will not enable him to acquire a ſettlement by reſidence during *A.*'s life. *Rex* v. *Eatington*, 4 *Term Rep.* 177.

28. A father, in conſideration of natural affection, conveys to his daughter, then under a certificate, a cuſtomary cottage for life, with remainder to her children. This is a voluntary ſettlement, and not a purchaſe within 9 *G.* 1. *c.* 7. and ſhe gains a ſettlement. *Rex* v. *Ingleton*, *Burr. Seſſ. Caſ.* 560.

29. The pauper contracts for the purchaſe of a copyhold eſtate for 39*l.*, which was mortgaged to another perſon for 32*l.* He paid 7*l.*, and was admitted to the eſtate ſubject to the mortgage; he never paid it off, but, after continuing four years in poſſeſſion, delivered up the premiſes to the mortgagee. He gained no ſettlement, for *per cur.* he only purchaſed the intereſt of the mortgagor ſubject to the mortgage, ſo that it is a purchaſe not for 30*l.* but for 7*l.* *Rex* v. *Mattingley*, 2 *Term Rep.* 12.

30. A cer-

30. A certificated man and his wife made a joint purchaſe of an houſe for leſs than 30*l.*; the huſbands by improvements made it worth more, and was taxed as for a tenement of 30*l.* He then died, and his wife continued to reſide there for 10 months. She gains no ſettlement hereby, for, by the court, ſhe and her huſband were joint purchaſers, taking jointly, and not by moieties. She can only ſtand in the ſame ſituation with him, which was that of a purchaſer. And as to the value, the act takes it according to the purchaſe-money actually paid, and not that which is afterwards laid out. *Rex* v. *Dunchurch*, *Burr. Seſſ. Caſ.* 553. *Black. Rep.* 596. 598. *Vid. Rex* v. *Benjoy*, *cont. diſſentiente Reynolds*, *ſed adjornatur*, 19 *Vin.* 373. *Fol. Poor Laws*, 239.

31. If the huſband and wife be certificated, and afterwards the huſband purchaſe a cottage for five pounds in the certificated pariſh, and die. The widow and her children born under ſuch a certificate, one of whom was ſeparated from the reſt to prevent its catching the ſmall-pox, but reſided in the ſame pariſh, will gain a ſettlement by a reſidence of 40 days after the huſband's deceaſe. *Rex* v. *Long Wittenham*, 24 *G.* 3. *Mich. Term.* 2 *Bott* by *Conſt*, 693. *pl.* 608.

32. The conſideration mentioned in the deeds conveying the eſtate to the pauper, and in the receipt indorſed, was 28*l.* Evidence was admitted to prove that he made it up 30*l.* before the execution of the deeds, the vendor refuſing otherwiſe to execute them. *Filmer* v. *Goit*, 7 *Bro. P. C.* 70. cited *per* Lord *Kenyon* C. J. *Rex* v. *Scammonden*, 3 *Term Rep.* 474.

33. The huſband left his wife and children, whereupon ſhe went and reſided 40 days in a copyhold tenement of his. *Per cur.* As there appears no diſſent, it is to be preſumed that ſhe came there with her huſband's conſent, and, being only likely to become chargeable, can't be removed, though ſhe gains no ſettlement by the reſidence. *Rex* v. *Aythrop-Rooding*, *Burr. Seſſ. Caſ.* 412. *Rex* v. *Leeds*, S. P. *Burr. Seſſ. Caſ.* 524. *Black.* 466.

34. *W. F.* being poſſeſſed of and entitled to a tenement and two acres and an half of land, in the pariſh of *A.*, for a term of years, determinable on lives, died inteſtate about *Chriſtmas* 1728, leaving ſix children. The huſband of one of his daughters, who reſided in *A.* under a certificate, entered upon the premiſes, together with his wife and ſon *W.* five years old. But no adminiſtration was granted to them, or any other perſon. They lived there 29 years, but the ſon *W. about* 1748 married, and lived apart from them until his death, when his family becoming chargeable were removed to the pariſh certificating his father. But the court were of opinion, that the father gained a ſettlement in *A.*, as having acquired by 20 years poſſeſſion a *right* under the ſtatute of limitations, from which he was not removable; and it is to be preſumed from the other children not controverting it for ſo long a time, that they had given up their right. The ſon *W.* then gained a derivative ſettlement from his father, as being entitled to his, until he had acquired another, which he is not ſtated

to

to have done, and there is no ground to ſay that he muſt neceſſarily be taken to have left his family before his father had acquired a complete ſettlement by an undiſturbed poſſeſſion of 20 years. *Rex* v. *Cold-Aſhton*, *Burr. Seſſ. Caſ.* 444.

35. A certificate man may gain a ſettlement by purchaſe in the certificated pariſh, and the conſtruction on the certificate act ſeems to be the ſame as on the 13 & 14 *Car.* 2. that let the value be what it will, a perſon cannot be removed from his own. *Rex* v. *Stansfield*, *Burr. Seſſ. Caſ.* 205. 1 *Seſſ. Caſ.* 316.

36. *Rex* v. *Dedington*, S. P. and that the certificate man having ſold the eſtate makes no difference, unleſs it appears that he gained a ſubſequent ſettlement. *Burr. Seſſ. Caſ.* 220.

37. Deviſe of a tenement to the wife of a certificate man for her life, ſhe and her huſband lived therein for ſix months. The huſband gains a ſettlement. *Rex* v. *Shenſton*, *Burr. Seſſ. Caſ.* 468.

38. If a certificate man make a purchaſe in the pariſh to which he is certified, and his apprentice reſides with him there 40 days, he gains a ſettlement. *Ivinghoe* v. *Stonebridge*, *Stra.* 206. *Vid.* alſo 19 *Vin.* 391. S. C.

39. *E. B.* by will deviſed her eſtate in the pariſh of *W.* to truſtees to be ſold, and the money ariſing from the ſale to be divided equally between *R. B.* and the three daughters of *W. B.* her nephews; *R. B.* was certificated to *W.* The deviſees agreeing that *R. B.* ſhould have the real eſtate, and the daughters the perſonal, the truſtees conveyed to him, and he reſided upon it ſeveral years. The certificate is diſcharged, and he gains a ſettlement; for *per cur.* a deviſee of a ſurplus, ariſing from the ſale of lands, after payment of debts and legacies, has an equitable intereſt in the lands themſelves, in which caſe reſidence gives a ſettlement. *Rex* v. *Wivelingham*, *Dougl.* 738. *Cald.* 121.

40. If a perſon, formerly ſettled at *A.*, while living on his own eſtate at *B.*, receive a certificate from *A.*, the certificate is diſcharged by his ſubſequent reſidence of 40 days upon his eſtate at *B.* *Rex* v. *Uſton*, 3 *Term Rep.* 251.

41. In all caſes, whether of ownerſhip of land, or renting 10*l.* a-year, a reſidence of 40 days is neceſſary to gain a ſettlement. *Rex* v. *Weſt Shefford*, *Burr. Seſſ. Caſ.* 307. *Say.* 2.

10 Vin. 274.

(E) By Marriage.

1. BY 26 *G.* 2. *c.* 33. after the 25th day of *March* 1754, all marriages (except in *Scotland*, and except the marriages of jews and quakers, where both the parties are jews or quakers reſpectively), which ſhall be ſolemnized without licenſe, or publication of banns, or in any other place than a church or public chapel wherein banns of matrimony have been *uſually* publiſhed (unleſs by ſpecial licenſe from the Archbiſhop of *Canterbury*), or without the conſent of parents or guardians (where either of the parties, not being a widower or widow, is under the age

age of 21), ſhall be null and void to all intents and purpoſes whatſoever.

2. The pauper being under age, and not a widower, was married by licenſe, but without his father's conſent, who was living. *Per cur.* the words of the ſtatute are "that the marriage ſhall be null and void," and we can't underſtand it to be voidable only. There is a diſtinction between acts made againſt one party for the benefit of another, and thoſe made againſt both. *Rex* v. *Preſton*, *Burr. Seſſ. Caſ.* 486.

3. A marriage is void, and no ſettlement is gained by it, if celebrated in a chapel erected ſince the 26 *G.* 2. although *banns* had been often publiſhed and marriages celebrated there. *Rex* v. *Northfield*, *Dougl.* 634. *Cald.* 115. *Sed vide* this cured 21 *G.* 3. *c.* 53.

4. The pauper was removed with his wife from *N.* to *E.* by an order, which was unappealed againſt; afterwards the pariſh of *E.*, finding that they were not married, removed the woman from *E.* to the pariſh of *S.*, and upon appeal it was proved that they never were married, and the ſeſſion confirmed this ſecond order. But the court of *K. B.* quaſhed the order, for *E.* having neglected to appeal from the firſt order of removal to *E.*, when they might have controverted the fact of the marriage, they were now eſtopped. *Rex* v. *Enborn*, *Burr. Seſſ. Caſ.* 551.

5. The pauper and his wife being both illegitimate and under age, and the mother of the wife the only parent of either then living, and no guardian having ever been appointed for either, were married without any conſent given. This marriage is void by 26 *G.* 2. *Rex* v. *Hodnett*, 1 *Term Rep.* 96.

6. A female baſtard, under age, married by a licence with the conſent of her putative father, gains a ſettlement in her huſband's pariſh by ſuch marriage. *Rex* v. *Edmonton*, 2 *Bott* by *Conſt*, 85. *pl.* 121.

7. The father and mother of the pauper, reſiding in the ſame pariſh, went from thence, declaring they were going to be married, and ſoon returned, declaring they had been married; and they cohabited together as man and wife for 30 years, until the woman's death. The father was produced to prove that they never had been married, and that a former huſband was then living. But the ſeſſions refuſed to admit him, and the court ſeem to think that 30 years cohabitation was ſufficient proof. *Rex* v. *Stockland*, *Burr. Seſſ. Caſ.* 508. *Vid. Morris* v. *Miller*, 4 *Burr.* 2059. 1 *Bl. Rep.* 632.

8. A witneſs proved, that he and another perſon was preſent when a marriage was ſolemnized between the pauper and one *T. M.* But the entry in the regiſter book was not ſigned by the miniſter, parties, or witneſſes. 'Tis not incumbent on the perſons married to prove that the banns were publiſhed, nor does the entry, directed to be made by 26 *G.* 2. *c.* 33. *ſ.* 14, 15. affect the validity of the marriage. *Rex* v. *St. Devereux*, *Burr. Seſſ. Caſ.* 506. 1 *Black.* 367.

9. On the removal of a woman to her ſuppoſed huſband's ſettlement, the illegality of the marriage may be proved by the man himſelf, or by his real wife. *Henley* v. *Cheſham*, 2 *Bott* by *Conſt.* 81. *pl.* 118.

10. A wife, after the huſband ran away, went to live upon a copyhold of his, where he had never reſided; ſhe may not be removed, but her huſband being alive, ſhe could not thereby gain a ſettlement. *Aythrop Roding* and *White Roding*, 3 *Burn's Juſt.* 484.

11. In *Rex* v. *St. Botolph's, Biſhopsgate*, a woman, marrying a man who has no ſettlement and is gone to ſea, is removable to that which ſhe had when ſingle; and *Rex* v. *Norton*, 19 *Vin.* 376. and *Burr. Seſſ. Caſ.* 122. is denied to be law. *Burr. Seſſ. Caſ.* 367.

12. An order of removal, reciting that the wife of a poor perſon now living had obtruded, and was likely to become chargeable, and that her ſettlement was in the pariſh of *M.* It was moved to quaſh it, becauſe it did not appear that the huſband was in the pariſh of *M.* at the time of the removal, ſo that it might be, they ſent the wife away from the huſband. But *per cur.* it neither appears that the wife was ſent away from her huſband, nor that he was not in the pariſh to which ſhe was removed, and we are not to preſume it to be ſo. *St. Michael's* and *Nunny*, *Stra.* 544. *Rex* v. *Ironacton*, *Burr. Seſſ. Caſ.* 153. and *Rex* v. *Higher Walton*, *Burr. Seſſ. Caſ.* 162. S. P.

13. The wife and children of an *Iriſhman*, who had no ſettlement, being ill of a fever, became chargeable to the pariſh, and were removed to the ſettlement of the wife's, the huſband remaining behind and maintaining himſelf. The court were of opinion that the wife could not be removed from her huſband, and that it is not like the caſes where he is dead, or has left her. *Rex* v. *Carleton*, *Burr. Seſſ. Caſ.* 813.

14. On the removal of the wife, it is enough in the firſt inſtance to prove her maiden ſettlement. *Rex* v. *Ryton*, *Cald.* 39. *Rex* v. *Hedſor*, *Cald.* 371.

15. So of a widow. *Rex* v. *Woodsford*, *Cald.* 236.

16. In the huſband's abſence, his wife and children were removed by an order, ſtating them to be the wife and children of *T. G.*, which was not appealed againſt. This is concluſive upon the pariſh, as to its being the ſettlement of the huſband alſo. For if it had been put in the order that it was the huſband's ſettlement, it would be clear, and the omiſſion makes no difference. The general rule is, that the huſband's ſettlement is that of the wife's. There are ſome exceptions, but the preſumption is in favour of the general rule, and an exception ſhould be ſtated. *Rex* v. *Hinkſworth*, *Dougl.* 46. *Cald.* 42. *Rex* v. *Leigh*, *Dougl.* 45. *Cald.* 59. S. P.

17. A woman and her four children were removed, in the abſence of her huſband, to the place of *her* laſt legal ſettlement; the order ſetting out nothing more. She was a feme covert, and removed in fact to her huſband's ſettlement. The huſband, on his return,

return, went to live with them where they had been removed to, but was removed thence by a ſubſequent order, which was confirmed by the ſeſſions; but the court quaſhed both without oppoſition, on the authority of *Rex* v. *Hinkſworth*. *Rex* v. *Towceſter*, *Hil.* 25 *G.* 3. *Cald.* 47. *n.*

18. If a marriage, which is compaſſed by fraud, take effect, the ſettlement ſeems notwithſtanding to be good; for the perſons guilty of this fraud are puniſhable by information and indictment. *Vid. Rex* v. *Watſon*, 1 *Wilſ.* 41. *Rex* v. *Tarrant*, 4 *Burr.* 2106. 3 *Burn's Juſt.* 492.

(F) By *Notice*. Who muſt give Notice, and what amounts to it. 19 Vin. 378.

NO ſoldier, ſeaman, ſhipwright, or other artificer or workman, in his majeſty's ſervice, ſhall have any ſettlement in any pariſh, port town, or other town, by delivering and publication of notice in writing, unleſs the ſame be after a diſmiſſion out of the ſervice. 3 *W.* 3. *c.* 11. *ſ.* 4.

(G) By ſerving Offices. 19 Vin. 378.

1. WHERE the cuſtom is for the jury at the leet to preſent the conſtable, and the perſon preſented procures a deputy to act for him, who is ſworn before a juſtice, but not preſented by the jury, he gains no ſettlement. *Rex* v. *Winterbourn*, *Burr. Seſſ. Caſ.* 520. *Vid.* 19 *Vin.* 379. *pl.* 2. S. P.

2. Same law as to the deputy of a tithing-man. *Rex* v. *Allcannings*, *Burr. Seſſ. Caſ.* 643.

3. The pauper was ordained a deacon, in order to ſupply the cure of the pariſh of *Over*, during the ſequeſtration (the vicarage being ſequeſtered for three years, *or till the biſhop ſhould releaſe it*), and he did the duty for a year. *Per cur.* This is no annual office to gain a ſettlement. The ſequeſtration may be determined at any time. *Rex* v. *Over*, *Burr. Seſſ. Caſ.* 746. *Vid.* 19 *Vin.* 392. *pl.* 9.

4. *Qu.* The point whether he gains a ſettlement as an hired ſervant. *Freem. Rep.* 518. But no deciſion.

5. Serving the office of collector of the land tax will gain a ſettlement. *Rex* v. *Hammond*, *Hil.* 7 *G.* 1. 2 *Bott* by *Conſt*, 283. *pl.* 291.

6. The caſe ſtated that the pauper had ſerved the office of hogringer for the pariſh of *C.*, he having been choſen and ſworn in at a court leet; and that it was an office of great antiquity, and ſerviceable to the pariſh. He gains a ſettlement *Rex* v. *The Inhabitants of Whittleſea*, 4 *Term Rep.* 807. *Nolan's Rep.* 136.

7. A certificate man being choſen conſtable for a city, executed it through the ſeveral pariſhes for a year. He is ſettled in the ter-

certificated parish where he resided. *Rex* v. *St. Maurice, Winchester, Burr. Sess. Cas.* 27.

8. The pauper was told by his wife that the borseholder had left a wooden tally at his house, as a token of his having been chosen borseholder at a court leet of the manor. But he did not know this of his own knowledge, nor was there any evidence of a presentment or election, and he never took the oath of office, or acted but once. The court thought there was no foundation for supposing the pauper legally placed in the office. *Rex* v. *Wringham, Burr. Sess. Cas.* 223. 2 *Stra.* 1199.

9. The pauper served the office of tithing-man for half a year, and five years' after for another half year, pursuant to a custom in the hundred. This is not an annual office, and therefore gives no settlement. *Rex* v. *Cold-Ashton, Burr. Sess. Cas.* 444.

10. The pauper having a certificate, was chosen into the office of tithing-man, which did not extend through the whole parish, but comprehended the part where he resided; he executed it for five months, and then, becoming chargeable, was removed. *Per cur.* It is not necessary that the office should extend over the whole parish, the act saying only "that it shall be an annual office *in* the parish. But the office must be executed for a year to give the certificate man a settlement. *Rex* v. *Fittleworth, Burr. Sess. Cas.* 238.

11. A certificate man being sworn into the office of petty constable, and executing it by deputy, thereby discharges the certificate; and an apprentice bound to him afterwards, gains a settlement under his indentures. *Rex* v. *Hope-Mansel, Cald.* 252.

12. So where a certificate man executed for a year the office of ale-taster in a borough not one fifth of the parish, it gives a settlement. *Rex* v. *Whitechurch, Burr. Sess. Cas.* 365. *Say.* 134.

13. Lands were conveyed to trustees, among other things, to pay 10*l.* yearly to a charity school, to be paid to the vicar for the time being. A certificate man officiates as schoolmaster, and received the 10*l.* annually from the vicar. *Per cur.* A schoolmaster is no annual office, and it don't even appear how or what interest he had in it, neither is this a tenement of 10*l.* a-year. The legal right to receive the salary is in the vicar, who has paid it to this man as his deputy. He gains no settlement. *Rex* v. *Melborne, Stra.* 1225. *Burr. Sess. Cas.* 244.

14. The church-yard lay in two parishes; the person chosen sexton, who served six years, gained a settlement in that one in which he resided, though no part of the church lay in it, for it is a public office within 3 *W. & M. c.* 11. *s.* 6. *Rex* v. *Liverpool, 2 Term Rep.* 118.

(I) By Parents' Settlement.

19 Vin. 382

1. WHEN a father gains a ſecond ſettlement after the birth of his child, that ſettlement is immediately communicated to the child, who may be removed thither without ever having been there before. *St. Giles, Reading*, and *Everſley Blackwater*, 2 *Seſſ. Caſ.* 112. *Stra.* 580. *Ld. Raym.* 1332.

2. Though above the age of nurture, if it has gained no ſettlement. *Sowton* v. *Sydbury*, 2 *Seſſ. Caſ.* 150. *Andr.* 345.

3. Order of two juſtices removing *Eliz. Knott* of the age of five years, *John Knott* about two years and a half, and *Sarah* about one and a half, from *Bucklebury* to *Bradfield*. On an appeal, their father *Charles* was ſubpœnaed, but did not appear. In ſupport of the order, it was proved that the paternal grandfather died ſettled at *Bradfield*, and that his ſon was born there. The regiſter of the marriage of the ſon *Charles*, and of the baptiſms of the paupers, was alſo produced; but it did not appear whether *Charles* had gained a ſettlement ſubſequent to this derivative one. His mother was alſo produced to prove that he brought the children to her, telling her that they were his, and that he would ſend money to pay for their maintenance. No other evidence was given to identify them as being his children. The court were of opinion that there could be no objection to the competency of this evidence, and that if the father had gained a ſettlement ſubſequent to his derivative one, it was incumbent on *Bradfield* to have ſhewn it. *Rex* v. *Bucklebury*, 1 *Term Rep.* 164. *Vid.* alſo, as to the evidence of identity, *Rex* v. *Inhabitants of Cxeech St. Michael*, *Burr. Seſſ. Caſ.* 765. *ante.*

4. The pauper was born at *Bruton*, where his father reſided under a certificate. He lived with his father there until he was 19, and then removed to *Norwich*, where he married twice, had children by each wife, and reſided near 40 years. Two years after the birth of the laſt child, his father gained a new ſettlement at *St. Matthew's, Ipſwich*, but the ſon had never lived with him ſince he left *Bruton*. On an appeal againſt an order, removing him and his children to this laſt ſettlement of his father, the court were of opinion that after ſuch a length of time he did not follow it, but that he and his children were ſeparated from the family of the grandfather. *St. Michael's Coſlany* in *Norwich* and *St. Matthew's* in *Ipſwich*, 2 *Seſſ. Caſ.* 129. *Stra.* 831.

5. It was held alſo in *Rex* v. *Bugden*, that emancipation by marriage, and living away from the father, prevents the ſon from gaining a derivative ſettlement through a ſettlement acquired ſubſequently by the father. *Burr. Seſſ. Caſ.* 270. 1 *Wilſ.* 183. S. C.

6. So if he be emancipated by liſting for a ſoldier and continuing in the ſervice four years. *Rex* v. *Inhabitants of Walpole St. Peter's*, *Burr. Seſſ. Caſ.* 638. 1 *Black.* 669. S. C.

7. But where the ſon worked about the country as a ſtuff-weaver, but came to his father's houſe when he pleaſed, kept his holiday cloaths there, and conſidered his father's houſe as his own, although he paid for what he had when there, and might go to work where he pleaſed. It was held by three judges, abſ. Lord *Mansfield*, that he was not emancipated, but acquired a ſettlement where his father went to reſide. *Rex* v. *Halifax*, *Burr. Seſſ. Caſ.* 806.

8. So where a child, five years old, left his father's houſe, and lived with different relations until ten, without acquiring a ſettlement in his own right, it was determined that he followed that of his father. *Rex* v. *Offchurch*, 3 *Term Rep.* 114. *Vid.* alſo *Rex* v. *Tottington Lower End*, *Cald.* 284.

9. So a child, ſeparated from her father, by being maintained ſeveral years in the workhouſe, is not emancipated. *Rex* v. *Broadhembury*, *Hil.* 25 *G.* 3. 2 *Bott* by *Conſt*, 55. *pl.* 78.

10. So where a ſon, 16 years old, was bound apprentice in *A.* for four years, which he ſerved, and never afterwards returned to his father's family, but gained a livelihood by his trade, the indenture was void for want of a ſtamp, and the father in the mean time gained a ſettlement at *B.* It was holden that the ſon was not ſettled in *A.* by the apprenticeſhip, and was not emancipated, but followed his father's ſettlement at *B.* *Rex* v. *Edgeworth*, 3 *Term Rep.* 353. *Vid.* alſo *Rex* v. *Stretton*, 2 *Bott* by *Conſt*, 54. *pl.* 77.

11. In *Rex* v. *Wilton cum Twambrookes*, it is laid down, that caſes of emancipation have always been decided on circumſtances, either of the ſons being 21, having gained a ſettlement in his own right, or having contracted a relation inconſiſtent with the idea of his being in a ſubordinate ſituation in his father's family. 3 *Term Rep.* 356.

12. The infant ſon of a perſon living at *A.* under a certificate hired and ſerved a year at *B.*, an extraparochial place; he then returned to *A.* under 21, where he was hired for and ſerved a year. He gains no ſettlement in *A.*, for his ſervice in *B.* is no emancipation. *Rex* v. *Collingbourne Ducis*, 4 *Term Rep.* 200.

13. A child, although more than ſeven years old, follows the ſettlement of its mother after the death of its father. *Rex* v. *Barton-Tuffe*, *Burr. Seſſ. Caſ.* 49. where it is likewiſe holden, that the order need not ſpecify in ſuch a caſe that the child has gained no ſettlement. *Sed vid. Rex* v. *Bowling*, *Burr. Seſſ. Caſ.* 177.

14. So if the father have no ſettlement, although he be living. *Rex* v. *St. Paul's*, *Shadwell*, 2 *Seſſ. Caſ.* 113. *Rex.* v. *St. Botolph's* without *Biſhopsgate*, *Burr. Seſſ. Caſ.* 367. *Say.* 198. *Tynton* v. *King's Norton*, *Lent Aſſizes*, 13 *G.* 1. 2 *Bott* by *Conſt*, 33. *pl.* 61.

15. But where the father, having a ſettlement, deſerts his wife and children, and the wife afterwards reſided on a freehold eſtate deviſed to her; the court were of opinion that the caſe of foreigners was anomalous, and that the wife gains a ſettlement there through neceſſity; but that a wife cannot gain a ſettlement in the lifetime of her huſband, and that her inhabitancy on this eſtate

was

was not the inhabitancy of her huſband, ſo as to gain him a ſettlement there without a reſidence for 40 days. *Berkhamſtead* and *St. Mary, Northchurch*, 2 *Bott* by *Conſt*, 36. *pl.* 64. 2 *Seſſ. Caſ.* 182.

16. Where the ſettlement of the pauper's father was unknown, the father died, the mother marries a man having a ſettlement, the ſettlement of the pauper is in the laſt maiden ſettlement of the mother, for the new gained one is not in her own right. *Rex* v. *St. Giles's in the Fields*, *Burr. Seſſ. Caſ.* 2. 3 *Salk.* 259.

17. If a man, who has a derivative ſettlement from his mother, marries a woman with a ſettlement, and dies without acquiring one, his children follow this derivative ſettlement; for there is no difference in this reſpect between an acquired and a derivative ſettlement, and no recourſe can be had to the ſettlement of the mother, if that of the father can be found. *Rex* v. *St. Matthew, Bethnal Green*, *Burr. Seſſ. Caſ.* 482.

18. A widow, by reſidence during her quarantine, gains a ſettlement for herſelf and children who are not emancipated, although they do not reſide with her during the quarantine, by reaſon of an occaſional ſeparation. *Rex* v. *Long Wettenham*, *Mich.* 25 *G.* 3. 2 *Bott* by *Conſt*, 41. *pl.* 68.

19. It was determined in *Rex* v. *Inhabitants of Hemlington*, *B. R. Hil.* 17 *G.* 3. that where children, whoſe ſettlement is diſtinct from that of the mother, are living with the mother where ſhe is ſettled, they are to be maintained by the pariſh where they are ſettled, and that whether they are baſtards or legitimate. *Dougl.* 9. *n.* and *Rex* v. *Saxmundham*, *Forteſ.* 307. and *Shermanbury* v. *Bolney*, *Carth.* 279. cited as in point.

20. It is not neceſſary that a child under ſeven ſhould reſide with the grandmother in her pariſh for the ſake of nurture, although ſhe is liable to allow towards her maintenance. *Rex* v. *Haſfield*, *Burr. Seſſ. Caſ.* 147.

(K) By Payments, *i. e.* of Pariſh Rates.

19 Vin. 384.

1. TO gain a ſettlement, the tenant muſt both be charged in the rate and pay it. *Rex* v. *Sarrat*, *Burr. Seſſ. Caſ.* 73. *Rex* v. *Bramſhaw*, *Burr. Seſſ. Caſ.* 98. *Rex* v. *Lower Walton*, *Ib.* 100. *Rex* v. *St. Cuthbert*, *Burr. Seſſ. Caſ.* 817.

2. The mother, who was rated and paid all aſſeſſments, died, and her name was continued in the rate book. Her ſon became tenant at her death, and paid all the aſſeſſments, and the pariſh officers knew that the woman was dead. *Per cur.* There muſt be ſuch rating and paying as to ſhew manifeſtly that the pariſh had notice. It being known that the mother was dead, the rate could only be made on the occupier. *Rex* v. *Heckmondwicke*, *Dougl.* 543. *Cald.* 107.

3. The pauper was entitled, as one of the repreſentatives of an inteſtate, to part of a leaſehold eſtate, of which he received the

rent. A poor's rate was made "on the occupier of late Mrs. *H.*'s," and the pauper paid it twice on the overſeer's application. He gains no ſettlement, for the rate is on the occupier, which he is not. *Rex* v. *Chew Magna*, *Cald.* 365. *Vid. Kingsfair* v. *King's Swinford*, *Eaſt.* 4 *G.* 2. 2 *Bott* by *Conſt*, 228. *pl.* 256.

4. The tenant agreed with the landlord to pay all the taxes; the rating was thus, "*Thomas Clifford* or tenant." The tenant paid the taxes, and got receipts in his own name. The pariſh can't but know that he is the occupier, and he gains a ſettlement. *Rex* v. *Painſwick*, *Burr. Seſſ. Caſ.* 465.

5. The farm is rated by its name, the landlord pays the rate, and is allowed it by the tenant. But the order ſtates, that the overſeer who received it knew nothing of the pauper, nor whether he reſided at the farm. *Per cur.* The ground of the determination in *Rex* v. *Painſwick* was the notoriety of the occupancy, *but we can't preſume againſt the ſtated fact*, "that the overſeer knew nothing of the pauper." *Rex* v. *Llangammarch*, 2 *Term Rep.* 628.

6. A tenement was charged in the rate book thus, "*late Lowbridge's.*" The tenant paid the poor rates in his own right. He gains a ſettlement, for his name need not be inſerted; if the pariſh officers have notice of him, it is enough. *Rex* v. *Walſall*, *Cald.* 35.

7. The land tax rates, being entitled as made on the *inhabitants*, was in the following form—"RENT 5*l.* LANDLORD'S NAME, Mr. *Gaſſon.* TENANT'S NAME, *John Heard.*" *Heard* paid the rate to the collector who demanded it. *Per cur.* The rate in this caſe is charged on neither the landlord nor tenant; we muſt ſee therefore, from other circumſtances, who is charged. This tax is pointed at the occupier, who is oſtenſible; it is levied on him. The pariſh have nothing to do with the repayment by the landlord. Then the aſſeſſment profeſſed to be made upon the inhabitants, that is, the occupiers, who muſt be ſo, and not the landlord, who may or may not. It is alſo demanded of the occupier, and paid by him. *Rex* v. *Mitcham*, *Cald.* 276.

8. The rate had no title, and did not on the face of it ſhew whether the tenant or landlord was rated; the pauper had been called upon, and paid the land tax for four years; but, being reduced in circumſtances, deſired to be excuſed, and he never paid afterwards. For two years ſubſequent, neither the name of the pauper, nor any other perſon living on the premiſes, was inſerted in the rates, and the landlord was not rated. The court were of opinion, that from theſe circumſtances, as no one elſe was charged, the pariſh thought that the tenant ought to pay, or nobody, and that he gained a ſettlement. *Rex* v. *Endon*, *&c. Cald.* 374.

9. The names of the landlord and tenant are both on the land tax rate; the tenant pays. This is *primâ facie* a tenant's tax, and being received of him, he is to be conſidered as rated. *Rex* v. *St. Lawrence*, *Wincheſter*, *Cald.* 379.

10. But

10. But where, under like circumſtances of the rate's being ſilent as to the perſon who was the object of it, the receipt given to the tenant ſtated, that the ſum paid was aſſeſſed upon the landlord; the court were of opinion, that this collateral matter rebutted the legal preſumption that the tenant was intended to be rated, and ſhewed that it was the landlord. *Rex* v. *St. James, Bury St. Edmund's, Cald.* 384.

11. The pauper was duly rated, and, having abſconded, his landlord deſired the collectors "to levy a diſtreſs upon his goods *leſt he* ſhould loſe the money." When they went to do this, a friend of the pauper's gave a guinea to the collectors, who thereout received the tax. This is a payment of the rate by the pauper, the money being advanced to his uſe. *Rex* v. *Bridgewater*, 3 *Term Rep.* 550.

12. The landlord agreed to pay all taxes. The rating was "*Bowden*," who was the tenant. The landlord paid the taxes ſome time, but then deſired the overſeers to call on *B.* for a poor rate and church rate, and that he would allow it out of his rent. The tenant, when he paid them, ſaid that he paid for his landlord, and the officers accepted it as ſuch. The taxes were not allowed to him till three quarters of a year after he left the eſtate. *Per* Lord *Mansfield* C. J. It is a tenant's tax, and he is aſſeſſed by name; the agreement between his landlord and him is nothing to the pariſh. *Rex* v. *Openſhaw, Burr. Seſſ. Caſ.* 522. 1 *Black. Rep.* 463.

13. A church rate was made, in which the name of the pauper appeared thus—"*W. F.* (to bring ſecurity) 1*s.* 6*d.*" When the rate was firſt made and caſt up, no ſum was ſet againſt the name of *W. F.*; but the next year the churchwarden met the pauper, who told him that he had got a certificate, whereupon the churchwarden demanded and received 1*s.* 6*d.*, and inſerted it in the rate. *Per cur.* This is not an informal rate, it is no rate at all. *Rex* v. *Warblington, Burr. Seſſ. Caſ.* 787.

14. In the land tax rate, the aſſeſſment was "LANDLORD RATED, *W. B.* Eſq. FOR LANDS AND TENEMENTS IN THE OCCUPATION OF *T. R.*" It is the landlord that is rated, and though the tenant pays, he gains no ſettlement. *Rex* v. *Carſhalton, Burr. Seſſ. Caſ.* 809. *Rex* v. *St. John's, Southwark, Cald.* 62. *Dougl.* 214. S. P.

15. It is a queſtion of fact whether the landlord or tenant is rated to the land tax, and ſhould be found by the ſeſſions. *Rex* v. *St. Lawrence, Wincheſter, Cald.* 379. *Rex* v. *St. James, Bury St. Edmund's, Ib.* 385. *Rex* v. *Folkeſtone*, 3 *Term Rep.* 505. *Rex* v. *Rainham*, 5 *Term Rep.* 240. S. P.

16. When it is found, the court are precluded from conſidering whether they have drawn a right concluſion, though the ſeſſions ſtate all the circumſtances on which they found it. *Rex* v. *Folkeſtone*, 3 *Term Rep.* 505.

17. The overſeers made a rate of 2*s.* in the pound in this form—

Rent.		Occupiers' Names.	Sums aſſeſſed.
£.10		*A. B.*	£. 1.
£. 4		*Richard Goodiff.*	

The overſeers demand 8*s.* *R. G.* refuſes, alleging he is no pariſhioner. They threaten to diſtrain, and he pays. They afterwards leave the money, which the tenant throws after them. *Per* Lord *Mansfield.* It is not neceſſary that his proportion of the rate ſhould be ſtated in the column of the ſums aſſeſſed. The column ſtating his rent, with the title of the rent, aſcertains it. He has paid, and againſt his will. *Rex* v. *Carhampton, Dougl.* 599. *Cald.* 108.

18. If the collectors of the land tax demand payment of the tenant, and on his refuſing they ſhew him a paper-writing in order to enforce the payment thereof, and read over the ſum he was to pay, they levy the ſum demanded by diſtreſs, and afterwards he continues to pay the ſum, it ſhall be *intended* that he was ſo rated, unleſs the contrary be clearly proved. *Rex* v. *St. Iſſey, Burr. Seſſ. Caſ.* 826.

19. A ſon lived with his mother, and was rated and paid the tax for the eſtate which ſhe occupied; it was objected that this was not his ſhare but his mother's ſhare of the taxes. But the court were clear, that being charged and having paid, he gained a ſettlement. *Rex* v. *Stapleton, Burr. Seſſ. Caſ.* 649.

20. Doctor *Burn* makes a *Qu.* as to the law of the deciſion *that payment of a bridge rate gives no ſettlement,* 19 *Vin.* 385. (K) *pl.* 4. ſince 12 *Geo. c.* 29. That ſtatute enacts, that a ſum certain ſhall be raiſed upon every *diviſion in proportion to their poor rate* towards the repair of bridges and other county expences; ſo that a man eaſes the diviſion by ſuch payment, and there is the ſame notoriety of his inhabitancy as in the caſe of a poor's rate. 3 *Burn's Juſtice,* 500.

21. A tide waiter was rated for his ſalary to the land tax where he reſided; he paid it for ſome time himſelf, but was repaid by the collector of the cuſtoms, who afterwards paid it. *Per cur.*—It is ſettled that the land tax is a pariſh tax within the act, and the collector did not pay it to exonerate the pariſh but to better the man's ſalary. *Rex* v. *Oakhampton, Burr. Seſſ. Caſ.* 5.

22. A rigger living in *Sheerneſs,* who pays the 6*d.* a quarter which is ſtopped out of the pay of the people belonging to *Sheerneſs* dock-yard, for the relief of the poor of the vill of *Sheerneſs,* will not thereby gain a ſettlement, for there is no legal rate made by the overſeers. *Rex* v. *Friendſbury, Burr. Seſſ. Caſ.* 644.

23. If an artificer in his majeſty's ſervice be rated by the pariſh to the land tax and pay, he thereby gains a ſettlement. *Rex* v. *St. Mary, Whitechapel, Cald.* 24.

24. A labourer in the king's dock-yards being rated to and paying the land tax gains a ſettlement. *Rex* v. *St. Mary's, Whitechapel, Cald.* 24.

25. A tenant

25. A tenant being aſſeſſed to and paying two quarter's land tax, gains a ſettlement although it be allowed him again by his landlord. *Rex* v. *Bramley*, *Burr. Seſſ. Caſ.* 75. 2 *Seſſ. Caſ.* No. 167. *Rex* v. *Chidingfold*, *Burr. Seſſ. Caſ.* 415. *Rex* v. *Fulham*, *Ib.* 488. S. P.

26. By 21 *G.* 2. *c.* 10. Perſons aſſeſſed to and paying the duties on houſes and windows ſhall not gain a ſettlement.

27. By 18 *G.* 3. *c.* 26. Payment of the duties impoſed by that act on houſes worth the yearly rent of 5*l.* and upwards gains no ſettlement.

(L) By renting 10*l.* a-Year.

19 Vin. 387.

1. THERE muſt be reſidence for 40 days to give a ſettlement by renting 10*l. per ann.* *Rex.* v. *Delwyn*, *Burr. Seſſ. Caſ.* 54. *Vid.* 19 *Vin.* 371. *pl.* 2. *Grandborough* v. *Muſley*, S. P.

2. The paupers *hired a houſe and land jointly* at 16*l. per ann.*, which they jointly tilled and occupied, and paid an equal ſhare of the rent. The court were of opinion, that though with regard to the landlord's remedy for the rent each might be conſidered as occupier of the whole, yet the act only conſiders the right of the occupier, which is but to the half, and that neither gained a ſettlement, that half not being of the value of 10*l.* a-year. *Rex* v. *Marden*, *Burr. Seſſ. Caſ.* 311. *Vid. Croft* v. *Gainſford*, *Durham Aſſizes*, 7 *G.* 2. 2 *Bott* by *Conſt.* 184. *pl.* 213.

3. *T. G.* having taken a farm of 52*l.* a-year, told the pauper, who had been his partner in another farm, that he depended upon his going to live there with him. They took their joint ſtock there, managed the farm together, and both reſided thereon for ſeven years. The landlord gave his receipts for rent to *G.* only, and diſtrained for his rent upon ſuch ſtock as he ſuppoſed to be his, and *G.* made a bill of ſale of them to him without the interpoſition of the pauper, who ſtood by. The court were of opinion that he gained a ſettlement as having an intereſt in the farm at leaſt as tenant at will to *T. G.* of a moiety, which was of the value of 10*l.* And *per Wilmot* J. The opinion of the landlord as to who the tenant was is not eſſential. *Rex* v. *Duns-Tew*, *Burr Seſſ. Caſ.* 398. *Say.* 311.

4. The pauper rented a tenement of 10*l.* a year, and paid the rent. He lived for more than 40 days in a part of it worth 40*s* but had let the reſt immediately to under tenants; he gains a ſettlement. For the ground the act goes upon is the perſon's having ſufficient credit to hire a tenement of the value of 10*l.*, and the pauper in this caſe is the perſon liable for the rent, and who has credit for the whole. *Rex* v. *Llandverras*, *Burr. Seſſ. Caſ.* 571. *Black. Rep.* 603.

5. A firſt and ſecond floor unfurniſhed at the rent of 10*l.* a-year is a tenement, although the apartments are not diſtinct from the houſe. *Rex* v. *St. George's*, *Hanover-Square*, *Burr. Seſſ. Caſ.* 692. 2 *Bott* by *Conſt.* 151. *pl.* 191.

6. So is a ſhop occupied ſeparately from the houſe to which it belongs. *Rex* v. *St. Giles's in the Fields*, *Burr. Seſſ. Caſ.* 798.

7. The pauper being a clerk to ſome juſtices, hired a furniſhed room at ſo much *per* week, for the juſtices to meet and tranſact the pariſh and other public buſineſs, the landlord was to find firing and have the uſe of the rooms on aſſembly nights. This is a tenement. *Rex* v. *Whitechapel*, *Hil.* 26 *G.* 3. 2 *Bott* by *Conſt.* 154. *pl.* 194.

8. *The pauper took two tenements* at the yearly rent of 11*l.* They were jointly occupied and managed by him and the widow of his partner in a former farm; *but neither of his landlords knew of this connection at the time of taking theſe tenements.* He gains a ſettlement by a reſidence for 40 days. For *per cur.*: The widow was in the nature of an under-tenant to him; he alone had the credit of taking the tenements, and he alone was perſonally reſponſible for the rent. *Rex* v. *Newnham*, *Burr. Seſſ. Caſ.* 756.

9. A pauper tenant at will underlets, and the landlord afterwards receives rent, ſome times from the pauper, ſome times from the under-tenant. The pauper, after the under-letting took another tenement, which made up 10*l.* Adjudged that he continued tenant of the firſt tenement, and therefore gained a ſettlement. *Rex* v. *Maghull*, 24 *G.* 3. 2 *Bott* by *Conſt.* 200. *pl.* 225.

10. *A.* occupied a tenement of the value of 11*l. per ann.* rented of different landlords and died, leaving three children, to two of whom he bequeathed five ſhillings each, and to the latter, whom he made executrix, the reſidue of his property. The pauper, who had before married the executrix, reſided on the tenement above 40 days, and paid rent for it, the court held that this gained a ſettlement, though the wife never proved the will. *Rex* v. *Netherſeal*, 4 *Term Rep.* 258.

11. The pauper entered as executor, and reſided 12 weeks on a tenement rented at 22*l. per ann.* to a fifth of which he was entitled by deviſe. The court were of opinion, that having a right devolved to him as executor, the value of the premiſes was totally immaterial. For by common law he cannot be removed from his own, and therefore gains a ſettlement by a reſidence of 40 days. *Rex* v. *Uttoxeter*, *Burr. Seſſ. Caſ* 538.

12. The father of the pauper lived in and rented an houſe at 25*l.* yearly, and paid the church and poor rates, but was a priſoner in cuſtody of the warden of the Fleet at the time, the houſe being within the rules. The court were of opinion that the father, and therefore the pauper, gained a ſettlement by taking this houſe. *St. Margaret's Weſtminſter, and Ludgate*, 1 *Barnard. K. B.* 76.

13. The pauper rented a mill of the yearly value of 10*l.* but reſided in another townſhip, which maintained its own poor and had diſtinct officers. He gained no ſettlement where he reſided. For by the court, to gain a ſettlement by renting 10*l. per ann.* there muſt be a reſidence on the premiſes, or at leaſt in the pariſh where ſome part of them lies. *Rex* v. *Knighton*, 2 *Term Rep.*

Rep. 51. *Rex* v. *Topcroft*, *Mich.* 25 G. 3. S. P. 2 *Bott* by *Conſt.* 210. *pl.* 232. *Vid.* alſo *Rex* v. *Llandverras*, *Burr. Seſſ. Caſ.* 571. *Rex* v. *St. Giles's*, *Ib.* 800. *Rex* v. *Butley*, *Ib.* 107.

14. A coney warren with a cottage upon it is a tenement, and if rented at 10*l.* yearly gives a ſettlement; for it is the ability to pay 10*l.* yearly that is the foundation of the ſettlement, and whether he pays it for an houſe or a warren is immaterial. *Stone and Kinver*, *Stra.* 678. 2 *Seſſ. Caſ.* 109.

15. So alſo though the party taking it has no intereſt in the ſoil except the right of entering upon the warren to kill rabbits. *Rex* v. *Piddletrenthide*, 3 *Term Rep.* 772.

16. The father of the pauper rented for two years by parol the fiſhery of a pond, and alſo the ſpearſedge, flags and ruſhes growing in and about this pond at 10*l. per ann.* The court conſidered that the fiſhery and ſoil paſſed together, and therefore that it was a tenement. They were alſo of opinion, that it was only neceſſary that the pauper ſhould take the tenement, although the leſſor had no title to let it. *Rex* v. *Old Alresford*, 1 *Term Rep.* 358.

17. The pauper took *the paſture of a piece of land.* This was held not to be a tenement, for it is no more than taking the herbage or the common. *Minchinhampton and Biſsley*, 2 *Seſſ. Caſ.* 132. *Stra.* 874. *Burr. Seſſ. Caſ.* 316.

18. A farmer covenants to let and demiſe to the pauper a dairy of 16 cows, with a dwelling-houſe, feeding for the cows on 21 acres of clover ground, and 13 acres of meadow, with the afterleaſe of a mead. He was to provide for the uſe of the cattle five tons of hay when wanted, *and for the feed of the ſame cattle to cauſe* 10 *acres of clover ground and* 13 *acres of the meadow to be laid up at* Candlemas-day *and the other* 11 *acres of the clover at* Lady-day. He was to abate ſo much for each cow that did not calve before *May-day*, and ſo much if not at all. The pauper was to pay 3*l.* 5*s.* for every cow. The court were of opinion that this was no tenement within the act to gain a ſettlement. For a tenement muſt be in tenure and relate to land. But that this was a mere perſonal contract for the uſe and feeding of the cows. *Rex* v. *Lockerly*, *Burr. Seſſ. Caſ.* 315. *Say.* 21. *Bott. pl.* 642.

19. But in *Rex* v. *Piddletrenthide* the court were of opinion that renting a dairy was a tenement within the ſtatute, and *Rex* v. *Lockerly* was doubted. 3 *Term Rep.* 772.

20. And in *Rex* v. *Tolpuddle*, *Rex* v. *Lockerly* was denied *per tot. cur.* to be law, and they held that renting a dairy of cows, under an agreement that they ſhould be fed excluſively from *May* to *September* in certain lands of the annual value of 10*l.* was a tenement within the 13 & 14 *Car.* 2. and conferred a ſettlement. 4 *Term Rep.* 671. *Nol. Rep.* 73.

21. *Per Parker* Ch. Baron. The agiſting cows to paſture from *May-day* till *Martinmas* for three years ſucceſſively does not anſwer the deſcription of a tenement within the act. It ſhould be renting an houſe or ground of the yearly value of 10*l.* *Rex* v. *Linwood*, 2 *Bott* by *Conſt*, 148. *pl.* 188.

22. A

22. A certificated man, to whom the pauper was apprenticed, beſides an houſe and meadow of the value of 9*l.* occupied two cattle gates of the value of 1*l.* 4*s.* in a ſtinted paſture, on the condition that he ſhould keep in repair 3 common highway gates, which the perſons having a right to cattles gates were bound to ſuſtain. *Per cur.*—Theſe cattle gates paſs by leaſe and releaſe, and cannot be deviſed but according to the ſtatute of frauds; they are therefore a tenement within the ſtatute. *Rex* v. *Whixley*, 1 *Term Rep.* 137.

23. The pauper took the hay, graſs, and aftermath of a meadow, at the annual value of 10*l.* for ten months; paid no taxes, but fenced the land and ſpread the hillocks. This is a tenement within the 13 & 14 *Car.* 2. *Rex* v. *Stoke*, 2 *Term Rep.* 451.

24. So a ſettlement may be gained by renting the fogs or aftergraſs of a meadow. *Rex* v. *Brampton*, 4 *Term Rep.* 348.

25. By 13 *G.* 3. *c.* 84. A perſon renting turnpike tolls and reſiding in the toll-houſe ſhall not thereby gain a ſettlement. *ſ.* 46.

26. A perſon rented a tenement conſiſting of an houſe and lands of 12*l.* a-year, contiguous and uſually let together; part lay in one pariſh and part in another, neither of them being ſeparately of the annual value of 10*l.* This gives a ſettlement. *Elſted and Hollibourne*, *Stra.* 849. 2 *Seſſ. Caſ.* 130. *St. John's* v. *Amwell*, 1 *Stra.* 529.

27. The pauper was permitted by ſeveral perſons having a right of common, to occupy excluſively a tenement of the value of 20*l.* a-year, as a reward for his ſervices as a herd. He gained a ſettlement by reſidence. For *per cur.* The ſervice of the pauper is equivalent to his paying rent. *Rex* v. *Melkridge*, 1 *Term Rep.* 598.

28. It is the ſame thing whether the taking of two tenements be diſtinct or entire, in one pariſh or two; if they are, when taken together of the annual value of 10*l.*, the tenant gains a ſettlement in the pariſh where he lives. For it is the ability of the perſon to rent a tenement of 10*l.* a-year which excludes the preſumption of the pauper's being likely to become chargeable to the pariſh. *Rex* v. *St. Margaret, Fiſh-Street*, *Burr. Seſſ. Caſ.* 677. *Rex* v. *Donnington*, *Burr. Seſſ. Caſ.* 744. *Awſe* v. *Newnham*, *Ib.* 756.

29. The pauper took a tenement in *H.* for a year under the value of 10*l.* and in ſix weeks tendered the key to the landlord, who refuſing it, he left it with a neighbour for the landlord to take when he thought proper. He then went and took a tenement in another pariſh, at a rent which, with that he was to pay for the former, was above 10*l.*, and reſided there 40 days before the landlord took the key of the houſe in *H.* He gains a ſettlement, for here is a contract for a year in *H* not diſſolved; ſo that the pauper reſided 40 days holding two tenements at the yearly rent of 10*l.* *Rex* v. *St. Lawrence, Wincheſter*, *Burr. Seſſ. Caſ.* 588.

30. A per-

30. A perſon took an houſe in the pariſh of *G.* at 30*s.* *per ann.* and ſome land for growing potatoes at 11*l.* for eight months. As he took them without fraud he gains a ſettlement, for the renting need not be for a whole year. *Rex* v. *Shenſton*, *Burr. Seſſ. Caſ.* 474. *Rex* v. *Staunton under Bardon*, *Burr. Seſſ. Caſ.* 558. S. P. *Vid. St. Mary's Guildford, and Cranley*, 19 *Vin.* 388. *pl.* 10. ſeems *contrà*.

31. The pauper hired and reſided in an houſe for five months, paying 4*l.* The houſe at the time of hiring was worth 10*l.* by the year. He gains a ſettlement; for *per cur.* It is not the rent but the value that is material, and we are concluded from ſuppoſing it leſs than 10*l.* a-year by the finding of the juſtices. *Rex* v. *St. Matthew, Bethnall Green*, *Burr. Seſſ. Caſ.* 574.

32. A perſon took an houſe at the yearly rent of 10*l.*, the landlord agreeing to build additions, but did not. The juſtices find the value of the houſe, thus unimproved, to be 6*l.* 10*s.* *Per cur.* He gains no ſettlement, the yearly value is alone material, and that is found to be leſs than 10*l.* *Rex* v. *Southwold*, *Burr. Seſſ. Caſ.* 140. *Stra.* 1127.

33. A houſe, rated at 4*l.* a-year, is of the value of 15*l.* Reſidence gives a ſettlement. *Hil.* 1 *G.* 3. *Rex* v. *Bilſdale*, 3 *Burn*, 523.

54. A perſon took a farm at 10*l.* for the year, which had been let at that rent for ſix years paſt, but before then at 7*l.* When he firſt took it he was not of ability to ſtock it, and being told by the former tenant that it was too dear, he ſaid that he did not regard it, for it would gain him a ſettlement, and put an end to a diſpute between two towns about his ſettlement; but deſired the former tenant to take no notice of this. *Per cur.* We are to determine on facts found; as the ſeſſions have not found that the land was of leſs value than of 10*l.* a-year, as the value of the ſtock is immaterial, and as they have not expreſsly ſtated the taking to be fraudulent, we muſt adjudge the pauper to gain a ſettlement. *Rex* v. *Weſton*, *Burr. Seſſ. Caſ.* 166. 2 *Stra.* 1156. *Seſſ. Caſ.* No. 141.

35. The pauper took a meadow for 10*l.*, and let it for part of the year for 3*l.*, and for the remainder to his landlord for the remainder of the rent, without ever having ſtocked it. The court agreed with the ſeſſions in the concluſion, that this was a fraudulent taking. *Rex* v. *Woodland*, 1 *Term Rep.* 261.

36. The pauper took a farm at 8*l.* a-year, and alſo took another jointly at 3*l.* 15*s.* It was agreed that the partners ſhould divide the corn and hay on this laſt farm, and that after they were carried away, the pauper ſhould have the whole of it for the reſt of the year, paying to the other 4*s.* It was argued that the pauper held a tenement of 10*l.* a-year, for he was liable as joint-tenant to pay the whole 3*l.* 15*s.*, and was ſole tenant of that farm for the laſt half year; or at all events he paid 10*l.* 1*s.* 6*d.* a-year, 8*l.* for his ſeparate farm, 1*l.* 17*s.* 6*d.* being half the other, and 4*s.* for the laſt half year. *Sed per cur.* The tenement is under the yearly value of 10*l.*, for the rent is under 10*l.*, and the value muſt be eſtimated by

by the rent, and *always is to be taken according* to the rent. But an agreement between two joint-tenants is none. *Rex* v. *Kniveton*, *Burr. Seſſ. Caſ.* 409.

37. *Tamen quære et vid. Rex* v. *St. Matthew, Bethnall Green*, *pl.* 33. *Rex* v. *Bilſdale*, *pl. ſupra.*

38. The pauper took an houſe and land at 8*l.* a-year rent. His brother, converſing with him about his family and poverty, ſaid, I am ſorry for your family, and therefore I will give you a cloſe in *A.*, containing about four acres, to enjoy it as long as I pleaſe, and take it again when I pleaſe, and you ſhall pay nothing for it. The cloſe was worth 2*l.* 10*s.* The pauper enjoyed it three years. The tillage was done by the ſervants and horſes of the brother. One year it was ſown with wheat procured by the gleanings of the pauper's family, and another with the corn of the brother. The cattle of the pauper were alone put in that cloſe. The court thought this the firſt caſe which came directly before them on this part of the ſtatute. That from the words of the ſtatute it was ſufficient if a perſon *comes to ſettle* on a tenement of 10*l.* a-year. The pauper here had the cloſe in *A.* as tenant at will, for once he had ſown it with his own corn, no matter how he procured it; he would be entitled to the growing crop, and the brother could not turn him out. He was therefore in the poſſeſſion of a tenement of 10*l.* a-year, and there was a ſufficient taking within the ſtatute. *Rex* v. *Fillonghley*, 1 *Term Rep.* 458.

39. It was ſtated, that a man took a leaſe for ſeven years, and objected that it might be by parol, when it would be void for the whole, and ſo no ſettlement. *Per cur.* Then it ſhould have been ſo ſtated. We muſt take it to be by deed, otherwiſe it is no leaſe at all. *Rex* v. *Little Dean*, *Stra.* 555.

40. A certificated perſon took 3*l.* a-year in the pariſh to which he was certificated, and 40*l.* a-year in the next, but lived where the 3*l.* was, it is a ſettlement there. Caſe of *Stapleford* in *Leiceſterſhire*, *Stra.* 849.

41. If a certificate perſon rents 10*l.* a-year, he gains a ſettlement, although the whole is not in the pariſh to which he is certificated. The words in the act, "*ſuch pariſh*," relate only to the executing an annual office. *Rex* v. *Bowling*, *Burr. Seſſ. Caſ.* 177.

42. Renting a mill at 14*l.* a-year, and giving ſecurity for the rent, gains a ſettlement; for he who has credit to give ſecurity, has credit to pay rent. *Rex* v. *Butley*, *Burr. Seſſ. Caſ.* 107. *Stra.* 1077. *Seſſ. Caſ.* No. 320. *Vid.* 19 *Vin. Abr.* 388. *pl.* 7.

19 Vin. 389.

(M) By hiring and Service.

What ſhall be a ſervice for 40 days, to give a ſettlement under an hiring and ſervice for a year.

1. IT is not neceſſary that a ſervant ſhould reſide 40 days in a pariſh withot interruption; it is ſufficient to gain a ſettlement, if he reſide 40 days in the whole within the year. *Rex* v. *Greenwich*, *Burr. Seſſ. Caſ.* 243.

2. A ſer-

2. A ſervice in two pariſhes of more than 40 days in each, but not ſucceſſive in either, gives a ſettlement, not where the pauper has ſerved the moſt days, but where he lodged the laſt night. *Rex* v. *Loweſs*, *Burr. Seſſ. Caſ.* 825. *Rex* v. *Hulland*, *Dougl.* 633. *Cald.* 118. *Rex* v. *Iveſton*, *Cald.* 288. S. P. *Rex* v. *Great Bookham*, *Ib.* 290.

3. Where the laſt 40 days are ſerved in a place where no ſettlement can be gained, the ſettlement is in the place where the preceding 40 days were ſerved. *Rex* v. *St. Andrew's*, *Holborn*, *Hil.* 24 *G.* 3. 2 *Bott* by *Conſt*, 483. *pl.* 474.

4. The pauper hired herſelf for a year, and ſerved till within three weeks of the end of it, when her maſter, diſcovering her to be with child, turned her away, and paid her her year's wages and half a crown over. It was held to be a good cauſe of diſmiſſion, and that ſhe gained no ſettlement. *Rex* v. *Brampton*, *Cald.* 11. and *The King* v. *Marlborough*, *Vin. Abr.* tit. *Removal*, (C) denied.

Where marriage ſhall prevent a ſervant's gaining a ſettlement, and where not.

5. An unmarried man, being hired for a year, marries before the ſervice commences; he gains a ſettlement by a year's ſervice. *Rex* v. *Allendale*, 3 *Term Rep.* 382.

6. A wife, whoſe huſband is abroad, may gain a ſettlement by an hiring before his death, and a continued ſervice under ſuch hiring, *for a year after his death*, although his death was not known till after the year commenced. *Rex* v. *Henſingham*, *Cald.* 206.

7. The pauper, being hired for a year, ſerved three quarters, and then married. The maſter took him to a juſtice of peace, who allowed him to diſcharge him, but made no order in writing. This is no diſcharge from the ſervice ſo as to hinder a ſettlement; for a juſtice cannot diſcharge by parol, though the maſter may; nor without *a reaſonable cauſe*, which this is not. *Rex* v. *Hanbury*, *Burr. Seſſ. Caſ.* 322. *Say. Rep.* 100.

8. *T. W.*, by order of his father, agreed on the 16th with the pauper, being then married, that he ſhould ſerve his ſaid father for a year from the 24th, *in caſe the father approved of the terms*. The pauper's wife died on the 18th, and he went to *T. W.*'s father on the 24th, who then agreed to the terms, and the pauper ſerved a year. He was not a married man at the time of hiring, ſo as to prevent his gaining a ſettlement; for the agreement on the 16th was *conditional*, from which the father might have diſſented, and he was unmarried on the 24th when the complete agreement was made. *Rex* v. *Bank Newton*, *Burr. Seſſ. Caſ.* 455.

Both muſt be for a year.

9. Hiring and ſervice for two ſucceſſive half years in *Cumberland*, where it was the uſual mode, and the invariable practice of the ſeſſions to adjudge it a ſettlement, gives no ſettlement. *Rex* v. *Lowther*, *Burr. Seſſ. Caſ.* 674.

What ſhall be conſidered as a general hiring, and what not.

10. A boy went into ſervice without any expreſs hiring, and his maſter told him that if he ſtaid a year and behaved well, the next year he would give him a livery and wages. This is a general hiring for a year. *Wandſworth* v. *Putney*, *Eaſt.* 13 *G.* 2. 2 *Bott* by *Conſt*, 335. *pl.* 331.

11. The

11. The head keeper of *Ruſhmore* Lodge, having lately parted with one *Edward Hill*, who had been many years his ſervant at 3*l.* yearly wages, a keeper's livery, and meat, drink, and lodging, met the pauper and aſked him, "*do you like a keeper's life?*" and being anſwered in the affirmative, ſaid, "*then go into* Ned Hill's *place*, and you ſhall want no encouragement; *I'll give you a ſuit of cloaths directly.*" Without more converſation, the pauper went and continued in the ſervice three years; was provided *with meat, drink, and lodging, and received* 9*l.* It is clearly a general hiring, and therefore for a year; and by the ſervice a ſettlement is gained. *Rex* v. *Berwick St. John's*, *Burr. Seſſ. Caſ.* 502. *Vid* alſo *Rex* v. *Wincaunton*, *Burr. Seſſ. Caſ.* 299.

12. The pauper agreed to live in the houſe of his father-in-law, and to work with him in his trade of a button-maker at the rate of one penny *per* groſs, deducting 5*s.* a-week for board and lodging. This is not a general hiring for a year. *Rex* v. *St. Peter's* in *Dorcheſter*, *Burr. Seſſ. Caſ.* 513. *Black. Rep.* 443. S. C.

13. Hiring at the wages of 6*s.* a-week, board, lodging, and waſhing, ſummer and winter. Service under the agreement, 11 months, when the pauper was told he muſt lodge out of the houſe; upon which he *demanded* 6*d. a-week more, or he would quit the ſervice.* He received it, and ſerved to the expiration of the year. This demand of 6*d.* additional, and the maſter's compliance, deſtroys the preſumption of its being a general hiring for a year. *Rex* v. *Dedham*, *Burr. Seſſ. Caſ.* 653.

14. An hiring at 2*s.* 6*d.* a-week, to part on a fortnight or a month's notice, with a ſervice under it for ſeven years, the ſervant receiving his wages ſometimes at the end of the week, or a fortnight, or a month, as he wanted money, is not ſuch a general hiring as will gain a ſettlement. *Rex* v. *Bradninch*, *Burr. Seſſ. Caſ.* 662.

15. An agreement to ſerve as an oſtler at ſo much *per* week, is not an implied hiring for a year. *Rex* v. *Newton Toney*, 2 *Term Rep.* 453. *Rex* v. *Odiham*, *Ib.* 622. S. P.

16. The pauper was hired by an innkeeper to be a chaiſe-driver, but no time or terms were mentioned; he ſerved a year, and was found in meat, drink, and lodging, but no wages. He thought himſelf at liberty to leave his maſter when he pleaſed. Several witneſſes proved that this is the cuſtomary method of hiring, and that both maſters and drivers think themſelves at liberty to part when they pleaſe. *Per* three judges, *abſente* Lord *Mansfield*. Nothing is here ſtated to limit this indefinite hiring to leſs than a year. *Burr. Seſſ. Caſ.* 759. *Rex* v. *Stockbridge*.

17. The pauper agreed with the keeper of a public houſe, that he ſhould give him *one ſhilling a week*, as he had given the other man or men, and the vails of the ſtables. The pauper ſerved two years under this agreement. It is an hiring for a year. *Rex* v. *Seaton and Beer*, 2 *Bott* by *Conſt.* 352. *pl.* 340.

18. The pauper hired herſelf at the rate of one ſhilling and four-pence a week for as long a time as her maſter ſhould want a ſervant,

ſervant, and ſerved more than a year. This is not a general hiring for a year. *Rex* v. *Elſtock, Bott* by *Conſt.* 2d vol. 353. *pl.* 341.

19. So where the pauper ſerved for 16 years in the ſtable for his diet, lodging, and perquiſites, and no time ſtipulated, quitted his maſter ſeveral times at pleaſure, but lived for the laſt three years with him without interruption: the counſel who were to have argued this to be no ſettlement gave up the point. *Rex* v. *Bath Eaſton. Burr. Seſſ. Caſ.* 823.

20. A ſervant is hired for 11 months at 10 guineas, at the expiration of which time the maſter told him "he might ſtay on an end," without mentioning wages. The ſervant aſſented, and ſerved three years. This ſecond agreement is a general hiring, and the ſervant gains a ſettlement. *Rex* v. *Macclesfield*, 3 *Term Rep.* 76.

21. An hiring by the month for monthly wages, with liberty to depart at a month's wages or a month's warning, together with ſervice for five years, is only a ſpecial hiring for a month, and confers no ſettlement. *Rex* v. *Clare, Burr. Seſſ. Caſ.* 819.

22. The pauper, being hired for a year, agreed in the middle of the year to work by the piece, this is no waver of the original agreement to prevent his gaining a ſettlement. *Rex* v. *Alton, Eaſt.* 24 *G.* 3. 2 *Bott* by *Conſt.* 382. *pl.* 356.

23. Pauper came to his maſter upon liking, when, after having ſerved eight weeks, his maſter hired him for a year, *to commence from the beginning of the eight weeks*, and he ſerved that time out. This is not a hiring for a year, and confers no ſettlement. *Rex* v. *Ham, Burr. Seſſ. Caſ.* 304. 1 *Wilſ.* 307. *Say.* 8. *Rex* v. *Weſtwell*, 1 *Barnard. K. B.* 354. *Rex* v. *Hoddeſdon, Cald.* 23. *Rex* v. *Marton*, 4 *Term Rep.* 257. S. P. Of retroſpective hirings.

24. Hiring for 11 months for 4*l.* 10*s.* and an agreement to give a month's ſervice in beyond the 11 months, is hiring to ſerve a year, and with ſervice gains a ſettlement. For no particular technical words are neceſſary to make an hiring for a year. *Rex* v. *Milwick, Burr. Seſſ. Caſ.* 433. The hiring muſt be for a year.

25. No ſettlement is gained by a hiring and ſervice for leſs than a year, though the maſter tell the ſervant at the hiring that he ſhall not belong to the pariſh, and the ſeſſions ſtate ſuch contracts to be fraudulent. *Rex* v. *Murſley*, 1 *Term Rep.* 694.

26. The pauper hired himſelf for a year, with liberty to let himſelf for the harveſt month to any other perſon. He let himſelf out accordingly, but brewed for his maſter during that month, and ſlept at his houſe. This is only an hiring for 11 months. *Rex* v. *Biſhop's Hatfield, Burr. Seſſ. Caſ.* 439.

27. So hiring for a year with liberty of abſence for 11 or 12 days in the ſheep-ſhearing ſeaſon, the ſervant to have the benefit of what he gets during that time. This is no contract to ſerve a year, for the exception is part of it. *Rex* v. *Empingham, Burr. Seſſ. Caſ.* 791.

28. The pauper was hired to ſerve for a year, but at the ſame time he told his miſtreſs that being in the militia *he might be* abſent

ſent about a month in the year to attend that duty; but that he would pay a man to ſerve in his place or elſe make an allowance out of his wages for the time he ſhould be abſent. He abſented himſelf 30 days, attending in the militia, and made an abatement in his wages of 8*s.* for it. This is an hiring for the year within the ſtatute. For the event of ſerving in the militia was contingent, and it is a diſpenſation with the perſonal ſervice. *Rex* v. *Weſterleigh*, *Burr. Seſſ. Caſ.* 753.

29. A militiaman was hired for a year, with an expreſs exception, that he ſhould be abſent on duty for a month, and in lieu thereof would ſerve a month over the year. He was abſent that month in the militia, and ſerved but three weeks of the additional one. He gains a ſettlement. For there was an hiring and ſervice for a year without this additional month. The agreement for abſence in the militia being only what would have been implied, and the maſter muſt have aſſented to. *Rex* v. *Winchcomb*, *Dougl.* 376. *Cald.* 94.

Of cuſtomary hirings.

30. The pauper was hired at *Whitſuntide* to ſerve a year from thence to *Whitſuntide* following. It was ſtated that this was the cuſtomary mode of hiring ſervants in that country, had always been deemed a year's ſervice, and a full year's wages paid for it, whether the time was more or leſs than 365 days. In this inſtance the time between the feaſts was 16 days ſhort of a year. This is an hiring for a year, for there is no caſe that proves the abſolute neceſſity that it ſhould be for 365 days abſolutely, and ſervice under it gains a ſettlement. *Rex* v. *Newſtead*, *Burr. Seſſ. Caſ.* 669.

31. An hiring two or three days after *Michaelmas* to ſerve until *Michaelmas* following is inſufficient to gain a ſettlement. *Coombe and Weſtwoodhay*, *Stra.* 143. *The King and Weſtwell* 1 *Barnard.* 354.

32. Where there were two cuſtomary annual meetings for hiring ſervants, on the *Wedneſday* before, and that after *Michaelmas*; an hiring from the *Wedneſday* after, to the *Michaelmas* following, although according to the cuſtom of the county, gives no ſettlement, for upon the face of it, it is not an hiring for a year. *South Cerney and Coultſhorne*, 1 *Seſſ. Caſ.* 156.

33. So where the hiring was from the *Wedneſday* after *Martinmas-day* to ſerve till *Martinmas* following. *Rex* v. *Newton*, *Burr. Seſſ. Caſ.* 157.

34. The pauper hired himſelf at the ſtatute fair on the day next after *Old Michaelmas-day* to ſerve "*till*" the *Old Michaelmas-day* following, which was according to the cuſtom of the country. On *Michaelmas-day* he received his wages, and quitted the ſervice. *Per cur.*—There muſt be an hiring for a year without any deficiency. The cuſtom is material to explain the word "*till*," here, and determine whether this be an hiring for a year. If this be not ſo, no ſettlement has been gained in this part of the country. The parties have conſtrued this contract to be an hiring for a year, *and to include Michaelmas-day, for the pauper was actually in the*

the ſervice on that day. The ſervice explains the hiring. *Rex* v. *Naveſtock, Burr. Seſſ. Caſ.* 719. *Bott*, 387.

35. The pauper was hired on the 11th of *October*, being the day after *Old Michaelmas-day*, to ſerve *until Michaelmas* following. He ſtaid in the ſervice until the 10th of *October*, being the enſuing *Michaelmas-day*. *Per cur.* This is an hiring for a year. Though he were hired on the afternoon of the 11th, yet we ſhall ſay he was hired at 12 o'clock at night on the 10th. The law allows no fraction of a day. *Rex* v. *Syderſtone cum Bermer, Cald.* 19. 3 *Burn's Juſt.* 434. *Rex* v. *Shiplam*, 1 *Term Rep.* 490. S. P.

36. Cuſtom to hire at a ſtatute fair held on the *Friday* after *Old Martinmas-day* till the *Old Martinmas* following, which is conſidered as an hiring for a year. *Old Martinmas* fell on a *Tueſday*, the pauper was hired on the *Friday* enſuing to ſerve till *Old Martinmas-day* following. This is not an hiring for the year within the meaning of the act, but manifeſtly for three days leſs. *Rex* v. *Harwood* or *Hanwood, Cald.* 100. *Dougl.* 423.

37. Hiring three days after *Old Michaelmas-day* to ſerve until *the next Michaelmas*, which happened in leap year, together with a ſervice till the day after, making 365 days, is not an hiring for a year. *Rex* v. *Ackley*, 3 *Term Rep.* 250.

38. Agreement by a daughter with her father to do the offices of a ſervant for a year, for her board, lodging, ſuch profits as ſhe could make by keeping fowls, *and what ſhe could earn by her own labour.* This is a good hiring, and a ſervice under it confers a ſettlement. *Rex* v. *Chertſey*, 2 *Term Rep.* 37.

Neither the ſpecies of reward, nor the object of the ſervice, prevents an hiring and ſervice for a year from conferring a ſettlement.

39. An agreement for a year to teach a trade, the ſervant to find himſelf in neceſſaries, and the maſter to have half his earning, if he is not retained *eo nomine* as an apprentice, is a ſufficient hiring to gain a ſettlement. *Rex* v. *Little Bolton, Cald.* 367.

40. The pauper was hired for a year to ſpin yarn at 1*s.* 6*d. per* ſtone, to provide herſelf with meat, drink, waſhing, and lodging. *She thought that ſhe was not at liberty to work for another maſter, but that ſhe might play or be abſent from work as long as ſhe pleaſed.* This is an hiring for a year, and her apprehenſion of what ſhe might do is no part of the contract. *Rex* v. *King's Norton, Burr. Seſſ. Caſ.* 152. *Stra.* 1139. 2 *Seſſ. Caſ.* 146.

Of abſence from ſervice by the cuſtom of the place.

41. So a hiring for a year to work by the piece, *with an implied liberty from the uſage of the place*, to be abſent when the ſervant pleaſes, but not work for any other maſter, gives a ſettlement though the ſervant has abſented himſelf at different times during the year. *Rex* v. *Birmingham, Dougl.* 319. *Cald.* 77.

42. An infant, eight years old, was hired for three years, at ſo much *per* week, without diet, *&c.* The ſervice was to be only 11 hours in the ſix working days; all the reſt of his time, as well as on *Sunday*, the pauper was to be his own maſter. This is no hiring to confer a ſettlement, but in the nature of a contract from week to week. *Rex* v. *Macclesfield, Burr. Seſſ. Caſ.* 458.

Of a ſpecial exception from ſervice during particular times of the day or week.

43. The pauper covenanted to ſerve ſeven years, and not work for any other maſter, and that he would not depart from his work without licenſe, but would be in ſuch ſervice from ſix o'clock in the morning till ſeven in the evening of each day during the ſaid term, including half an hour at breakfaſt and one hour at dinner (except on *Sundays*). *Per cur.* There is no diſtinction between this caſe and *Rex* v. *Macclesfield*. *Rex* v. *Kingswinford*, 4 *Term Rep.* 219.

44. The father of the pauper made a contract for his ſon to work at certain tin mills in the pariſh of *A.* for one year. He ſerved for the year by working therein daily, except holidays and *Sundays*, according to the cuſtom of tinners, but eat, drank, and lodged with his father at *A.* He gains a ſettlement at *A.*; *for this is an abſolute entire contract for a year*, and the ſervice is according to the cuſtom of the country. This diſtinguiſhes it from *The King* v. *Macclesfield*. *There the exception was part of the original contract.* *Rex* v. *St. Agnes*, *Burr. Seſſ. Caſ.* 671.

45. An hiring for five years, to work ſhearman's hours only, which are uncertain, and to be at liberty at all other times, gives no ſettlement; for it is not an abſolute contract for a year, but contains an exception in it. *Rex* v. *Buckland Denham*, *Burr. Seſſ. Caſ.* 694.

Of conditional hirings.

46. The pauper was hired for a quarter of a year, and if her maſter and ſhe liked each other, to continue a year, and have 3*l.* wages. She continued a year, and adjudged to gain a ſettlement. *Rex* v. *Lidney*, *Burr. Seſſ. Caſ.* 1. 2 *Stra.* 950. *Seſſ. Caſ.* No. 175. 2 *Bott* by *Conſt*, 411. *pl.* 388.

47. So where the pauper was to go into ſervice a month on liking, and to quit it on a month's wages or month's warning on either ſide, and to have 5*l.* a-year wages; ſhe ſerved three years, and it was held an hiring within the ſtatute. *Rex* v. *New Windſor*, *Burr. Seſſ. Caſ.* 19. *Seſſ. Caſ.* No. 163.

48. Hiring for a year, with liberty to either party to determine the contract at the end of any quarter on a month's notice; the pauper declaring his reaſon for the agreement to be that he would not be hired ſo as to loſe his former ſettlement: ſervice for a year, and no notice given, gains a ſettlement. *Rex* v. *Atherton*, *Burr. Seſſ. Caſ.* 203.

49. So hiring for a quarter, at the rate of ſo much a-year, and if they liked to continue on, together with ſervice for a year, gains a ſettlement. *Burr. Seſſ. Caſ.* 289. *Rex* v. *St. Ebbs*. *Vide* alſo *Rex* v. *Ozleworth*, *Burr. Seſſ. Caſ.* 302.

50. So alſo ſervice for a year, under an hiring at ſo much a-week the year round, each to be at liberty on a fortnight's notice, gives a ſettlement. *Rex* v. *Birdbrooke*, 4 *Term Rep.* 245.

51. A boy came into a ſervice without hiring, his maſter then told him that if he ſtaid a year and behaved himſelf well he would give him a livery and wages the next. He lived there a year and four months, and received a guinea and an half wages. The court

court inclined to think this a conditional hiring. *Wandſworth* and *Putney*, 2 *Seſſ. Caſ.* 188. 2 *Bott* by *Conſt*, 335. *pl.* 331.

52. The pauper, on her examination, ſtated that her huſband was beyond ſea; that ſhe knew him ſome year's ſince to live in the pariſh of *T.* in the capacity of an hoſtler for two years; but whether there was any hiring relating to this ſervice was not proved, except that ſhe had heard her huſband ſay that he was ſettled at *T.* *Per cur.* The ſeſſion have drawn this concluſion, that he was hired and they have done right. *Rex* v. *Holy Trinity in Wareham*, *Cald.* 141. From what an hiring for a year is to be inferred, and from what it is not.

53. A young woman lived with her grandmother on an allowance of meat, drink, waſhing, and lodging; but there appeared no contract between them. It is not an hiring within the ſtatute. *Gregory Stoke* and *Pitminſter*, 2 *Seſſ. Caſ.* 120.

54. The pauper, when about eight years of age, was taken into a gentleman's houſe from charity; he got meat, drink, lodging, and cloaths for the ſix years he lived there; *but there was no contract as to the continuance of the ſervice, or as to any wages to be paid to him*; nor were any ever given to him. The court were of opinion that he did not gain a ſettlement by this ſervice; for though where a hiring is ſtated, they will preſume it regular, unleſs the contrary appears, yet here it was ſtated that there was no contract. *Rex* v. *Weyhill*, *Burr. Seſſ. Caſ.* 491. 1 *Black.* 206. *Vid.* alſo *Rex* v. *St. Mary*, *Guildford*, 2 *Bott* by *Conſt*, 332. *pl.* 329.

55. A negro ſlave, brought into this country by the maſter, does not gain a ſettlement by ſervice with him here, for there is no contract for ſuch purpoſe ſubſiſting between them. *Rex* v. *Thames Ditton*, 2 *Bott* by *Conſt*, 330. *pl.* 328.

56. The pauper, having ſtayed as helper to a waiter at an inn for ſix months was ſent for by him again on his being taken ill to aſſiſt him. He continued there, lodging and boarding, 19 months. The waiter went away in 13; after which time the pauper continued his ſervice, without making any agreement with the maſter, who knew of his being in the ſervice the ſecond day after he came. *Per cur.* Till the waiter went away, there could be no agreement between the maſter and the pauper, and the implied contract between them for the laſt ſix months is not ſufficient. *Rex* v. *St. Matthew's*, *Ipſwich*, 3 *Term Rep.* 449.

57. The pauper agreed with his ſtep-father to live in his houſe and work at his trade of a button-maker; to be paid a penny for every groſe of buttons, deducting 5*s.* a-week for his diet and lodging. The court were of opinion that there was nothing in the nature of the ſervice here which ſhewed this to be an hiring for a year, either expreſs or implied. *Rex* v. *St. Peter's* in *Dorcheſter*, *Burr. Seſſ. Caſ.* 513. *Black.* 443.

58. The pauper was hired from *Midſummer* to *Lady-day*, on which day he received his wages and left his maſter's ſervice, and went to his father's houſe, but had no clothes, except what he wore and a ſhirt which he left at his maſter's. When he had been there about an hour, he went back and agreed with his maſter for a year, What ſhall or ſhall not be a diſcontinuance of ſervice.

year, and was turned away at the end of six months. *Per cur.* If there be an hiring for a year and service for a year it gains a settlement, though the whole service be not under the first hiring. And the absence of an hour should not be looked upon as a discontinuance of it. *Rex* v. *Fifehead Magdalen*, *Burr. Sess. Cas.* 116. *Vid. Rex* v. *Ellisfield*, *Cald.* 4. S. P. The servant there disagreed with the master as to wages after he left him and before he was hired again, and took all his cloaths away.

What shall be a service for a year.

59. The pauper was taken ill on the day he was hired for a year, and had received a shilling God's penny, and continuing sick was unable to go into the service until a month afterwards, when his master being from home his wife complained that he had not come to his service according to his agreement, and therefore refused to receive him, whereupon the pauper's mother said, "we must fall into your will for wages, and take what you will allow us." The pauper served the rest of the year, when a deduction was made out of his wages for that month. He gains no settlement, for the service had never commenced under the first contract, and the agreement acted upon was a new one, under which there was only eleven months' service. *Rex* v. *Winterfett*, *Cald.* 298.

60. The pauper was hired from *Michaelmas* to *Michaelmas*, old style, to go into his place the *Wednesday* after *Michaelmas-day*, which happened on a *Sunday*. On coming to his service that day the master told him, that he had hired another in his place, but that he wanted a man to milk and plough; the pauper refused that service, and being told that he might go about his business, said, "Am I at liberty to hire myself to any other person?"—His master answering in the affirmative, he left the house, and took away his cloaths. In the course of the afternoon his master met him, and hired him into the milkman's place, with an increase of wages above their former agreement. The absence from *Michaelmas-day* to *Wednesday* is a dispensation of service by the master, and not an exception in the conntract. There is an hiring and service for a year without any interruption on account of the short disagreement, and the pauper gains a settlement. *Rex* v. *Grendon Underwood*, *Cald.* 359.

61. The pauper was hired in *November* till *Michaelmas* following at *6l.* 10*s.* Two or three days before it his master offered him the same wages for the next year, and on *Michaelmas-day* he offered him seven guineas, when they had agreed for wages all but the expence of washing. The servant had no intention of leaving his master. He continued in the house working as usual, and on the second day accepted the offer, and served part of the year. There is no discontinuance, for he continued in the same capacity, and the former hiring and service may be coupled with the subsequent one, as they are both of the same nature. *Rex* v. *Sulgrave*, 1 *Term Rep.* 778.

62. The pauper worked in the business of burling cloaths by a weekly hiring for a year and a half. Her master, at the end of every

every week desiring her to come the week following. On the last day of this service she agreed to serve him for a year, and entered on the service immediately, and continued in it eleven months. She gained no settlement, because this service under the hiring for a year cannot be coupled to that which was prior, for they are not of the same kind, the former not being a service under which a settlement could be gained if it had been performed under a yearly hiring. *Rex* v. *Urnton, Burr. Sess. Cas.* 280.

63. In *Rex* v. *Underbarrow and Bradleyfield*, the question, Whether service performed under a prior hiring for less than a year can be coupled with service for less than a year under a subsequent hiring for a year, so as to confer a settlement, was again opened on the ground that the leading cases of *South Molton* and of *Overton* and *Steventon*, 19 *Vin. Abr.* 391. were determined on facts prior to 8 & 9 *W.* 3. when hiring for a year and residence for 40 days would give a settlement, and that the court had always declared that if this had been *res integra* they would have determined the meaning of the statute to be, that the hiring and service must be for the same year. *Per cur.* The authority of the cases will be just the same whether the facts were prior to the statute or not, because the court determined them as upon facts subsequent to it. *Burr. Sess. Cas.* 545.

Where the settlement shall be when the service is in several parishes.

64. Hiring for a year and service in the parish of *B.* Before the end of the year, the servant removes with the master to the parish of *C.*, serves there seven days, which completes the year, is hired for another year with increase of wages, and serves several months longer in *C.* This is not a new service, but a continuance of the same with an increase of wages, and a settlement is gained in *C.* *Rex* v. *Underbarrow and Bradleyfield, Dougl.* 296. *Cald.* 65.

65. Service under an hiring for a year will connect with preceding services of the same kind under any number of hirings from week to week, so as to confer a settlement. *Rex* v. *Bagworth, Cald.* 179.

66. The pauper was hired for and served a year in the parish of *C.*, and had his wages, and continued with his master a quarter longer without coming to any new agreement. The master then removed with his family to the parish of *D.*, where the pauper continued to serve him for six months under the same contract. This is a continuance of an hiring and service for a year, and is sufficient to gain a settlement, which must be in the parish where it was performed the last 40 days. *Rex* v. *Croscombe, Burr. Sess. Cas.* 256.

67. The pauper, being unmarried, went into service under a general hiring as a post boy in the parish of *M.*, in seven monts he married, and about four months after removed to *G.* with his wife, where he slept for seven months, continuing to serve his master the whole time without coming to any new hiring. *Per cur.* He gains no settlement in *G.*, for he was incapable of making a new contract at the end of the first year. The court therefore

can't presume one, and supposing that he had made a new agreement a service under it could not gain a settlement. He shan't therefore do that by an implied contract, which he could not do by an express one. *Rex* v. *St. Giles's, Reading, Cald.* 54.

68. A groom hired for a year, and residing at a public place where his master had neither house nor estate, for the purpose of training running horses, gains a settlement there. *Rex* v. *East Ilsley, Burr. Sess. Cas.* 722. *Vid.* 19 *Vin. Abr.* 394 *pl.* 15 & 17.

69. The pauper was born under a certificate at *E.*, where he was hired as a covenant servant for a year, and then for a second. The last 40 days of the second year were served at *Scarborough*; while there he applied to his master to make a new agreement, *who said, "it would be time enough when they returned home to E.,"* which they did in six weeks. He served seven years afterwards at *E.* by yearly hirings. The question was, Whether by this residence at *S.* he gained a settlement there so as to discharge the certificate and entitle him to gain a subsequent settlement by a year's hiring and service at *E.*? *Per cur.* He gained no settlement at *S.*, his master went there as a sojourner for a particular purpose, not as an inhabitant. His domicil was not there. When they are to make an agreement for a third year they consider themselves absent from home; it would be perilous for places of public resort if such service was to gain a settlement, and a fraud upon parishes trusting to certificates if they were to be discharged by such means. The case of *St. Peter's* in *Oxford* and *Fawley*, is no where accurately reported; the truth of that case seems to be, that the mistress lived as much at *Fauley Court* with one son-in-law as at *Christ-Church* with the other, and the servant could not be settled at *Christ-Church*, for it was an *extra-parochial* single house. It is not therefore consistent with our present resolution, which is, *that the whole of the service was only a continuation of the service at* Elvetham, *and not a new* bonâ fide *service at* Scarborough, *which acquired him a settlement there. Alton and Elvetham*, 3 *Burn.* 459. *Burr. Sess. Cas.* 418. *Vid. The King and St. Peter's Oxford*, 19 *Vin. Abr.* 397. *pl.* 26. *Vid.* also that case transcribed from the original record. *Burr. Sess. Cas.* 422.

70. A servant under a yearly hiring served *the last* 40 *days at* Exmouth, which is a place generally resorted to by persons for the purpose of sea-bathing. He having accompanied his master, who went thither with his family and lived in an house hired by the week. The court held that he gained a settlement in *Exmouth*. *Rex* v. *Bath Easton, Burr. Sess. Cas.* 774.

71. A yearly servant sleeps the last 40 nights, but not successively, with his wife out of the parish in which his master lives, and without his knowledge. He gains a settlement there. *Rex* v. *Hedsor, Cald.* 51. *Rex* v. *Nympsfield*, S. P. *Cald.* 107.

Of absence from the service, and what shall be dispensation by the master, and what a dissolution of the contract.

72. Service in the middle of the year, by the master's consent, with another, is service of the master, and even without it, if the master dispenses with it by taking the servant back. *Rex* v. *Beccles, Burr. Sess. Cas.* 230.

73. A ser-

73. A ſervice with the executor of the maſter for the remainder of the year in a different pariſh from where the hiring for a year was made, is good, and confers a ſettlement in the ſecond pariſh, for the maſter's death does not diſſolve the contract. *Rex* v. *Ladock*, *Burr. Seſſ. Caſ.* 179.

74. So if it be in the beginning and middle of a year, it is purged by the maſter's receiving him back, and will not defeat a ſettlement by hiring and ſervice. *Rex* v. *Hanbury*, *Burr. Seſſ. Caſ.* 322. *Rex* v. *Eaton*, *Ib.* 47.

75. The pauper being a yearly ſervant ran away, and continued abſent for thirteen weeks, when he was apprehended by his maſter, and then agreed, upon being forgiven, "to relinquiſh part of his wages, and to go on in his place as he ought to do." He ſerved the remainder of the year, and held that he gained a ſettlement. *Rex* v. *Eaſt Shefford*, 4 *Term Rep.* 804. *Nol. Rep.* 133.

76. On an hiring from *Michaelmas* to *Michaelmas*, if the ſervant ſays he cannot come until the day after *Michaelmas-day*, and the maſter ſays he will ſhift for himſelf till then, it is a permiſſion of abſence, and if he continues his ſervice till the day before the enſuing *Michaelmas-day*, and then quits by leave of his maſter, it is a good ſervice for a year. *Rex* v. *Bray*, *Burr. Seſſ. Caſ.* 682.

77. A ſervant ſerved under a yearly hiring his year except five days, then left his maſter by conſent, the pariſh officers having given him two guineas to leave the pariſh. The ſeſſions not having ſtated fraud, the court can't intend it, and the party gains no ſettlement not having ſerved a year. *Rex* v. *Preſton*, *Burr. Seſſ. Caſ.* 69.

78. So where a perſon went away 12 days before the end of the year with his maſter's conſent, and was paid the whole year's wages; it is a determination of the contract, and gains no ſettlement. *Rex* v. *Caſtlechurch*, *Burr. Seſſ. Caſ.* 68. *Stra.* 1022.

79. Hiring for a year, and ſervice till within three weeks of the end of it, when the ſervant aſked his maſter's leave to go to the herring fiſhery. The maſter conſented if he could get a man to do his work; the ſervant did ſo, and paid him. On his return from ſea, three weeks after the year, he was paid all his wages. This is no diſſolution of the contract, and he gains a ſettlement. *Rex* v. *Goodneſtone*, *Burr. Seſſ. Caſ.* 251. *Stra.* 1232.

80. The pauper being hired for a year, three weeks before the expiration of it was diſcharged with his own conſent. He was abſent a fortnight, and then at his miſtreſs's requeſt went again into the ſervice, and a week after the expiration of the firſt was hired for another year, and ſerved ſix month. There is a diſcontinuance; the firſt contract being abſolutely diſſolved, and the two ſervices cannot be connected ſo as to confer a ſettlement. *Rex* v. *Caverſwall*, *Burr. Seſſ. Caſ.* 461.

81. Hiring for a year, and abſence for the laſt five weeks with leave of his miſtreſs. The ſervant then returns and receives his whole wages, from which he voluntarily deducts what he had

earned during his abſence. It was alſo ſtated that he declared he would have returned within the five weeks if his miſtreſs had required it. This is no diſſolution of the contract, but an abſence with leave. The parties conſidered the contract as ſubſiſting, for the ſervant deducted what he earned during the five weeks, and not the proportion of his year's wages. *Rex* v. *Nether Heyford*, *Burr. Seſſ. Caſ.* 479.

82. Sixteen days before the expiration of the pauper's ſervice under an hiring for a year, ſhe was frightened into fits, and her maſter, who was ill, being diſturbed by them, her miſtreſs deſired her to be taken to Mrs. *L.*, and if ſhe refuſed to receive her ſhe was to be brought back. She continued with Mrs. *L.* five days, and was then taken to the hoſpital. The day after ſhe had been received at Mrs. *L.*'s ſhe returned to her maſter's to fetch her cloaths, when her miſtreſs paid her all that was due to her of a full year's wages. No words of diſcharge paſſed, but ſhe looked upon herſelf as being ſo, and continuing ill never returned again into the ſervice. *Per cur.* This is a *bonâ fide* ſervice for a year, without fraud on either ſide. If a maſter gives a ſervant leave to be abſent a ſhort time and pays his whole wages, it is a good ſervice. If the ſervant is taken ill, it is a condition incident to humanity and implied in all contracts. The maſter is bound to take care of him, and cannot deduct wages in proportion to the continuance of his ſickneſs. There is no difference whether it happen in the middle or end of the year, or whether he is in the hoſpital or under his maſter's roof. *Rex* v. *Chriſtchurch*, *Burr. Seſſ. Caſ.* 494. *Black. Rep.* 214.

83. The pauper being hired for a year in the pariſh of *W.*, and having ſerved till within ten days of the end of it, aſked and obtained leave to go and viſit his relations, as he did not wiſh to be ſettled there. He returned to his maſter at the expiration of the year and hired himſelf as a day-labourer, and allowed for the days he had been abſent out of his daily wages. He is ſettled at *W.*, for the conſent of his maſter was fraudulent and a mere evaſion of the ſettlement. *Rex* v. *Frome Selwood*, *Burr. Seſſ. Caſ.* 565.

84. On an hiring for a year, if the maſter tells his ſervant that he ſhall be abſent becauſe of his ſettlement, and that he ſhall have a fortnight at the end of the year to get what he can, and the ſervant aſſents, though under an apprehenſion that the maſter would not otherwiſe have hired him, this is a diſpenſation with the ſervice for the time, and not an exception out of the original contract. *Rex* v. *Sulgrave*, 2 *Term Rep.* 376.

85. If an hired ſervant be removed and neglects to appeal, but returns to his place in a few days, and his maſter receives him, and he ſerves out the year and is paid his full wages, yet the abſence is ſuch an interruption of the ſervice as will prevent his gaining a ſettlement. *Rex* v. *Kenilworth*, 2 *Term Rep.* 598.

86. The pauper, within three weeks of the expiration of his year, being kicked by a horſe, went home to his friends to cure his

his leg, without his maſter's leave or knowledge, and did not return until the year was out, when he came to receive his wages, out of which the maſter made a deduction for this abſence. This was a reaſonable cauſe of abſence, and did not diſſolve the contract or hinder his gaining a ſettlement. *Rex* v. *Maddington*, *Burr. Seſſ. Caſ.* 675.

87. So if a ſervant hired for a year is diſabled by an accident in the beginning of the ſervice, and his maſter refuſes to receive him on his return from the hoſpital, and he continues incapable of work during the remainder of the year, he gains a ſettlement. *Rex* v. *Sharrington*, *Mich.* 25 *G.* 3. 2 *Bott*, 525, *pl.* 458. *Vid.* alſo *Rex* v. *Eaſt Rennet*, *Mich.* 26 *G.* 3. *Ib.* 527. *pl.* 461.

88. The pauper having ran away from the ſervice of *M.* hired for a year with *W.* Having ſerved him ſix months, *M.* inſiſted upon *W.*'s not keeping him in his ſervice. *W.* paid the pauper his wages to that time, and he ſerved as a labourer elſewhere for a fortnight; then, at the requeſt of *W.*, with the conſent of *M.*, he returned into the ſervice of *W.*, without any new agreement, and ſerved a month over the end of the year to make out his loſt time. He gains no ſettlement, for there was an abſolute diſſolution of the contract at the end of the firſt ſix months. *Rex* v. *Roſs*, *Burr. Seſſ. Caſ.* 689.

89. But the ſervant's deſire on the day before the end of the year that he may ſpend it with his friends, and a diſcharge and deduction of that day's wages, is no diſſolution of the contract, but an abſence with leave, and the pauper gains a ſettlement by ſuch a ſervice. *Rex* v. *Potter-Heigham*, *Burr. Seſſ. Caſ.* 699.

90. The pauper married a ſervant maid in the ſame houſe with him during his year's ſervice. His wife being about to quit her place, the maſter told the huſband that he ſuppoſed as his wife was going away he would like to go too: to which he aſſenting, the maſter ſaid he had no objections, and would pay him his whole year's wages. He did ſo, and the pauper left the ſervice, thirteen days being wanting to complete the year. *Per cur.* The maſter can always diſpenſe with the ſervice, he has done ſo here, and the pauper has ſufficiently ſerved his year. *Rex* v. *Richmond*, *Burr. Seſſ. Caſ.* 740.

91. The pauper being hired for a year, and her maſter going to live in another county, told her ſhe might look out for another place, or ſtay with him till he went. She continued till he went, which was within a week of the end of her year, and he paid her her year's wages, and half-a-guinea over. His going on that day was caſual, and he would have kept her had he ſtayed. She went into a new ſervice two days after. It is a good ſervice for a year. *Rex* v. *St. Bartholomew by the Exchange*, *Cald.* 48.

92. The pauper being hired for a year, gave warning eight days before the expiration of the year to leave her maſter at the end of it, and the maſter diſcharged her on the ſame day, paying her full wages, but the pauper declared on her examination that ſhe was willing to ſtay till the end of the year. This is not a

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diſſolution of the contract to prevent a ſettlement, but a mere diſpenſation with the remainder of the ſervice. *Rex* v. *St. Philip in Birmingham*, 2 *Term Rep.* 624.

93. Four days before the expiration of the pauper's year he was apprehended on a warrant, being charged as the father of a baſtard child. While in cuſtody of the pariſh officers his maſter ſettled with him, deducting 1*s.* out of his wages on account of his not ſerving the whole year. Though, he ſaid, he had no objection to the pauper's gaining a ſettlement in his pariſh other farmers might. *Per cur.* Here is no aſſent or agreement to go before the end of the year, but here are four days wanting in the ſervice, and it is by means of the ſervant's own act that he becomes incapable of completing it. His conduct was an offence againſt morality, and the conſequences of it are equivalent to a wilful abſence. *Rex* v. *Weſtmeon*, *Cald.* 129.

94. So although the pauper's maſter was an overſeer, and active in the commitment, and the pauper was let out as ſoon as the year expired, on giving his own bond to indemnify the pariſh. *Rex* v. *North Cray*, 2 *Bott* by *Conſt*, 525. *pl.* 459.

95. A ſervant being hired for a year, and when he had ſerved one quarter a diſpute happened between him and his maſter, the latter inſiſted on turning him away, and threw down his wages, which the pauper took up, went away, and continued abſent ſix days, during which time he looked upon himſelf as a freeman. He then returned at his maſter's requeſt, ſerved the reſt of the year, and was paid three quarters' wages. The court thought that the contract was abſolutely diſſolved. The return is upon the *requeſt* of the maſter. The meaning of purging an abſence is only where the act of abſenting is doubtful, which is not the caſe here. *Rex* v. *Greſham*, 1 *Term Rep.* 101.

96. If a ſervant hired at yearly wages be diſcharged four or five days before the end of the year upon the maſter's becoming bankrupt, and receives the full year's wages, the ſervice is ſufficient to gain him a ſettlement. *Rex* v. *St. Andrew's, Holborn*, *Trin.* 28 *G.* 3. 2 *Term Rep.* 627.

97. The pauper having ſerved within three days of his year, was beaten by his maſter and turned out of doors. The next morning the maſter requeſted him to return, but he refuſed, and threatened to complain of this ill uſage to a magiſtrate if he was not paid his whole year's wages. He was paid the whole, and then left his maſter's ſervice. This is not a conſtructive ſervice for a year, for there was no *animus revertendi*. *Rex* v. *Grantham*, 3 *Term Rep.* 754.

98. A ſervant, nine days before the expiration of his year, went on *Sunday* to get another place for the next year without his maſter's leave or knowledge. He returned on *Tueſday* morning, when his maſter deſired him to ſerve the maſter he had worked for the day before. He was then paid his wages up to that time, no farther converſation paſſing. But he wiſhed to have ſtayed the year, but his maſter would not let him. *Per cur.* This is no conſtructive

conſtructive ſervice. For the maſter by paying and the ſervant by receiving the wages put an end to the contract, and the ſervant was no longer under his maſter's control. *Rex* v. *Clayhydon*, 4 *Term Rep.* 100.

99. By 13 *G.* 2. *c.* 29. Servants in the *Foundling hoſpital* ſhall not by ſuch ſervice gain any ſettlement in the pariſh where the hoſpital is ſituated.

100. By 9 *G.* 3. *c.* 31. Servants in the *Magdalen hoſpital* (eſtabliſhed for the reception of penitent proſtitutes) ſhall not by ſuch ſervice gain any ſettlement in the pariſh where the ſaid hoſpital is ſituate.

Vide (K) 3 *Vin.* tit. *Apprentice.*

(O) Settlement by other Things, and herein of Settlement by Apprenticeſhip. 19 Vin. 799.

1. THE ſtatutes of *J.* 2. and *W.* 3. require 40 days reſidence after notice in writing to confer a ſettlement, but the latter ſtatute takes off the reſtriction of a notice with regard to an apprentice, becauſe he cannot be removed from his maſter, and continuing 40 days unremoveable without notice, is the ſame as continuing 40 days when removeable unremoved with notice. 3 *Burn*, 378. Of the execution of the indentures.

2. *Stephen Pethich* was placed out when fourteen as an apprentice for ſix years. No indenture of apprenticeſhip was then executed. The pauper believed that one part had been prepared about a year before the expiration of the term, but did not recollect whether it was executed by any of the parties. No ſettlement is gained. *Rex* v. *Stratton*, *Burr. Seſſ. Caſ.* 272. *Rex* v. *Mawnar*, *Burr. Seſſ. Caſ.* 290. S. P. *Rex* v. *Whitchurch Canonicorum*, *Burr. Seſſ. Caſ.* 540. *Rex* v. *All Saints*, *Hereford*, *Burr. Seſſ. Caſ.* 656. *Rex* v. *St. Michael's*, *Bath*, *Burr. Seſſ. Caſ.* 73. *Rex* v. *Kinſweare*, *lb.* 839. S. P.

3. The original indenture binding out an infant apprentice was duly executed by the pariſh officers, and allowed by two juſtices; but neither it nor the counter-part were ſigned by the maſter, but he accepted it, and conſidered the pauper as his apprentice, and ſhe lived with him as ſuch. This binding is valid notwithſtanding the 8 & 9 *W.* 3. *c.* 30. requires the maſter to execute a counter-part. For the object of that act was merely to compel the maſter to receive poor children as apprentices. *Rex* v. *Fleet*, *Cald.* 31. and *Rex* v. *St. Peter's on the Hill in Cheſter*, 2 *Bott* by *Conſt*, 547. *pl.* 482. cited as in point.

4. A pariſh apprentice, bound to a maſter reſiding in a different pariſh and county, gains a ſettlement by reſiding 40 days under the indenture, although the apprentice did not ſign the deed. *Rex* v. *St. Nicholas in Nottingham*, 2 *Term Rep.* 726.

5. A pariſh apprentice cannot gain a ſettlement under indentures to which the two juſtices have aſſented ſeparately, for they

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are for this defect abſolutely void. *Rex* v. *Hamſtall, Redware*, 3 *Term Rep.* 380.

6. If a father with the aſſent of the mother of a minor binds his ſon apprentice to the minor, the indentures are only voidable, and 40 days reſidence under them gains a ſettlement. *Rex* v. *St. Petrox, Dartmouth*, 4 *Term Rep.* 196.

Of the ſtamps neceſſary for the indenture.

7. By the ſeveral ſtamp acts the indentures are to be written on parchment, or paper ſtamped with a 6*s.* ſtamp, except indentures of pariſh apprentices, which are to be on a ſixpenny ſtamp.

8. An indenture of apprenticeſhip not being on ſtamped paper or parchment is abſolutely void to all intents and purpoſes, and cannot be given in evidence. *Rex* v. *Llanvair, Dyffryn Clwyd*, *Burr. Seſſ. Caſ.* 236. *Rex* v. *Holbeck*, S. P. *Burr. Seſſ. Caſ.* 198.

9. Where an apprenticeſhip is intended, and the parties, to ſave the ſtamp duties, enter into a written agreement, this defective apprenticeſhip ſhall not give a ſettlement by way of hiring and ſervice. *Rex* v. *Highnam, Hil.* 25 *G.* 3. 2 *Bott* by *Conſt*, 553. *pl.* 490

Of the duty payable under 8 An. c. 9. and 9 An. c. 21.

10. By 8 *An. c.* 9. and 9 *An. c.* 21. The maſter ſhall pay duty of ſixpence a pound for 50*l.* or under, and of twelve-pence a pound for every pound above, of money or of things not money, according to their value, *given with apprentices*, and proportionably for greater or leſſer ſums, except money given with pariſh apprentices or out of public charities. The ſum given to be written in the indentures in words at length. And beſides the ſtamps before requiſite, the indentures to be moreover ſtamped with another ſtamp, denoting the ſixpence or 12-pence a pound reſpectively. And if the ſums are not truly inſerted, or duties not paid or tendered, or indentures not ſtamped or tendered to be ſtamped within the time limited, ſuch indentures ſhall be void, and not available in any court or place, or to any purpoſe whatſoever.

11. A pauper was bound apprentice by indenture, the maſter had 20*s.* paid him, and the boy ſerved three years, but the maſter never paid the duty impoſed by 8 *An. c.* 9. and 9 *An. c.* 21. He gained no ſettlement under it, for the words of the act are poſitive, and to determine otherwiſe would be to make the indenture good to one purpoſe, when the act ſays it ſhall be void as to all. *Cueſden and Leyland, Stra.* 903. 2 *Seſſ. Caſ.* 134. *Rex* v. *Edgeworth*, 3 *Term Rep.* 354. S. P.

12. But on payment of the duty and penalty, and a receipt thereof from the ſtamp office produced in evidence, the writing is made good. 8 *Mod.* 265.

13. A perſon refuſed to take a boy as an apprentice becauſe he wanted cloaths, but propoſed to take him if his relations would clothe him, or give him money to do it. The grandfather of the boy agreed to pay 20*s.* to the maſter to clothe him, who agreed to take him as an apprentice. The maſter laid out 30*s.* in clothing the boy, and afterwards an indenture was executed, and the 30*s.* paid by the grandfather, and the apprentice ſerved under the indenture ſix years; but this 30*s.* was not mentioned in the indenture, nor was any duty paid for it, nor was it ſtamped with the additional ſtamp required by 8 *An. c.* 9. The court held, that

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the maſter was a mere agent employed by the grandfather to clothe the boy; that this was no more than putting a boy apprentice ready clothed; and that the ſtatute means money given for the benefit of the maſter. *Rex* v. *North Owram*, *Burr. Seſſ. Caſ.* 145. 2 *Stra.* 1132. 2 *Seſſ. Caſ.* 196.

14. Indenture of apprenticeſhip. Covenant by the father to find ſufficient meat, drink, apparel of all kinds, phyſic, lodging, and all other neceſſaries for his ſon during the term; for which purpoſe the maſter is to allow him 4*s. per* week. The indenture had no additional ſtamp purſuant to 8 & 9 *Anne*. The court ſaid, we can't preſume that 4*s.* is not an equivalent, and the indentures were held good. *Rex* v. *Portſea*, *Burr. Seſſ. Caſ.* 834.

15. So where the apprentice covenanted to find himſelf in meat, drink, &c. and the maſter covenanted to pay him ſo much *per* week, without ſtating for what purpoſe. The indentures were held good without this ſtamp upon the ſame reaſon as in *Rex* v. *Portſea*. *Rex* v. *Walton-le-dale*, 3 *Term Rep.* 515. *Vide* alſo *Perington* v. *Sudall*, 1 *Bott* by *Conſt*, 488. *pl.* 686. but went off on a compromiſe.

16. The father covenants to allow the apprentice meat, drink, and lodging every *Sunday*, and to find him in apparel of all ſorts except ſhoes and working aprons. A ſettlement is good under the indenture, though no addditional ſtamp duty was paid by the maſter on this account; the 8 & 9 *An.* relating only to money or valuables given to the maſter independent of the apprentice. *Rex* v. *Leighton*, 4 *Term Rep.* 732. *Nol. Rep.* 190.

17. Where 6*d.* is mentioned in the indenture as the ſum paid, it is not void for non-payment of this duty, for there is no coin ſmall enough to pay it, and by the act no ſtamp is required for leſs than 20*s.* *Baſter and Fairlam*, 1 *Wilſ.* 129. *Rex* v. *Yarmouth*, *Burr. Seſſ. Caſ.* 379. *Say. Rep.* 107.

18. The ſum of 5*l.* inſerted in the indenture as given with an apprentice, and no ſtamp denoting the duty of 6*d.* in the pound paid. The premium was paid out of a voluntary annual ſubſcription for putting out children apprentices brought up at the charity ſchool of the pariſh of *St. John, Wapping*. It was objected that this was a private and not a permanent charity, and ſo not within the exception of the act as to public charities, and conſequently the indenture void. *Per cur.* It is a public one, and it is unneceſſary that it ſhould be permanent. *Rex* v. *St. Mathew, Bethnal-Green*, *Burr. Seſſ. Caſ.* 574.

19. *So where a deviſe of* 50*l. to the pariſh of* Clifton, *to be given as the brother of the teſtatrix thinks fit, to put out children of the pariſh apprentices. Per cur.* This is not to put out particular apprentices, but all in a certain pariſh, for which the brother is truſtee. Where the maſter receives part of it with an apprentice, the indenture need not have this additional ſtamp. *Rex* v. *Clifton upon Dunſmore*, *Burr. Seſſ. Caſ.* 697.

20. A father agreed with the mother of a minor to bind his ſon apprentice to the minor, and *that he ſhould give the mother* 20*s.*

as a conſideration. The pariſh officers gave him the 20s. If this be not fraudulent the conſideration is not liable to the duty of 8 & 9 *Anne.* 1ſt, Becauſe the act applies only to money paid to the maſter or miſtreſs, *or to their uſe.* 2dly, This is within the exception of *ſ.* 40. the money being given *at the public charge of the pariſh*, and it makes no difference that the binding is voluntary here. *Rex* v. *St. Petrox*, 4 *Term Rep.* 196.

21. The not inſerting in words at full length the ſum received or contracted for, ſubjects the maſter to a forfeiture, but don't make the indenture void. *Rex* v. *North Owram*, *Burr. Seſſ. Caſ.* 145.

1 Seſſ. Caſ. 417. 22. It was holden in *The King* v. *Mellingham*, that a binding by an inſtrument not indented would not confer a ſettlement.

23. But by 31 *G.* 2. *c.* 11. No perſon who ſhall have been bound an apprentice by any deed, writing, or contract not indented, being firſt legally ſtamped, ſhall be liable to be removed from the place where he was ſo bound and reſident 40 days, by any order of removal or order of ſeſſions, by reaſon only of ſuch writing not being indented.

Of the perſon bound, and time for which he is bound.

24. If a boy binds himſelf he gains a ſettlement; for an infant may make an indenture for his own benefit. *Foley* 154 and 373.

25. Indenture of apprenticeſhip for four years, held only voidable by the maſter or ſervant, and that it confers a ſettlement. *Rex* v. *St. Nicholas, Ipſwich.* 2 *Stra.* 1066. *Burr. Seſſ. Caſ.* 91.

26. A girl bound till 21, without adding or day of marriage, held only voidable, and to give a ſettlement. *Rex* v. *St. Petrox*, *Burr. Seſſ. Caſ.* 248. 1 *Wilſ.* 96.

27. It is not neceſſary that a pariſh apprentice ſhould be bound until the age of 24. *Rex* v. *Woolſtanton. Sed Quære*, whether the point was there in queſtion. *Vid. Burr. Seſſ. Caſ.* 129.

Of apprentices ſerving perſons with certificates.

28. An apprentice, in conſequence of an agreement with his maſter, worked four years with a man reſiding under a certificate in another pariſh. He gained no ſettlement there; the intention of 12 *Anne* being to prevent certificate perſons from bringing a charge into the pariſhes to which they are certified. *Rex* v. *Ramſey*, *infra*, *Burr. Seſſ. Caſ.* 640.

29. The ſon of a certificated perſon, who is bound apprentice in the certificate pariſh, may, on his indentures being cancelled, bind himſelf apprentice in a different pariſh, and if he gains a ſettlement under the ſecond indentures, he may afterwards gain a ſettlement by hiring and ſervice in the pariſh to which his father was certificated. *Rex* v. *Weddington*, *Burr. Seſſ. Caſ.* 766.

30. If an apprentice to a certificate perſon be aſſigned to a ſecond maſter *in the ſame pariſh* he cannot gain a ſettlement in that pariſh, by ſerving the ſecond maſter. *Rex* v. *Hicley*, 4 *Term Rep.* 371.

31. A certificate by the ſame pariſh to a ſecond pariſh diſcharges a former one, and enables an apprentice to gain a ſettlement in that to which the firſt was granted, by a reſidence of 40 days

days there in the ſervice of his maſter. *Rex* v. *St. Peter, Derby*, 1 *Term Rep.* 218. *Vid. Rex* v. *Birdham, Hil.* 25 *G.* 3. 2 *Bott by Conſt*, 741. *pl.* 654.

32. An apprentice ſerves 22 days and then his maſter obtains a certificate. He gains no ſettlement. Otherwiſe if he had ſerved 40. *Rex* v. *Weſtbury, Burr. Seſſ. Caſ.* 470.

33. *Query* of *The King* v. *Olive's, Jewry*, 3 *Vin. Abr.* p. 30. for the boy ſeems to have gained a ſettlement where he ſlept. 3 *Burn.* 387.

34. An apprentice to a captain of a coaſting veſſel reſided and ſerved the laſt 40 days in the ſhip, then being in *Bridport* harbour, IN the pariſh of *Burton Bradſtock, which was the proper home of the veſſel.* He gained a ſettlement in *Burton*. *Rex* v. *Burton Bradſtock, Burr. Seſſ. Caſ.* 531. In what pariſh the ſettlement is to be.

35. Where the apprentice worked and dieted in one pariſh with his maſter, and ſlept with his wife in another for the laſt two years of his apprenticeſhip, he became ſettled where he lay at night. *Rex* v. *Eaſtleton, Burr. Seſſ. Caſ.* 569,

36. Inhabitation at different periods, and though a new ſettlement has intervened, may be connected ſo as to make a 40 days' reſidence under indentures, and the ſettlement ſhall be in that place where the pauper lodges the laſt night. *Rex* v. *Cirenceſter*, 1 *Stra.* 579. *Rex* v. *Sandford*, 1 *Term Rep.* 281. *Rex* v. *Brightheimſtone*, 5 *Term Rep.* 188. *Nol. Rep.* S. P.

37. A boy was bound to *F.* in the pariſh of *K.* and reſided with *F.*'s landlord for three years in the pariſh of *C.*, then became a cripple, and was ſent back to *F.* at *K.*, who put him to live with his grandmother at *K.*, where he reſided above 40 days. He is ſettled at *K.*, for it is the reſidence, and not actual ſervice that gains a ſettlement. *Rex* v. *Charles, Burr. Seſſ. Caſ.* 706.

38. An apprentice aſſigned to a ſecond maſter lives with a third by conſent of the ſecond, he gains a ſettlement with the third maſter; for if the ſecond conſented, that of the firſt is included. *Rex.* v. *Taviſtock, Burr. Seſſ. Caſ.* 578. *Black. Rep.* 635. Of ſervice with a ſecond maſter.

39. A man by parol agreement hires his apprentice as a ſervant into another pariſh, where ſhe lives 40 days, and he receives her wages. She is ſettled where ſhe ſerved. *Rex* v. *St. George's Hanover-Square*, 2 *Seſſ. Caſ.* 138. *Stra.* 1001. *Burr. Seſſ. Caſ.* 12.

40. So where there was an attempt to aſſign by indorſement and delivery of the indenture, and the apprentice bound herſelf a-new to the aſſignee: a ſervice is good with him to gain a ſettlement; for it is under the firſt binding and with the aſſent of the miſtreſs. *Rex* v. *St. Petrox, Burr. Seſſ. Caſ.* 248.

41. A landlord, in purſuance of a covenant to indemnify his tenant againſt pariſh charges, accepts an apprentice bound to the tenant by the pariſh, together with his indentures. The landlord afterwards, without the aſſent of the firſt maſter, places the pauper *with his brother, reſiding in another pariſh, as an apprentice, and is quitted of him.* It is a ſervice to gain a ſettlement under the original binding, and the actual conſent of the firſt maſter is unneceſſary.

neceſſary. *Rex* v. *Clapham, Burr. Seſſ. Caſ.* 266. 1 *Wilſ.* 158. and *Rex* v. *Eaſt Bridgeford, Burr. Seſſ. Caſ.* 133. cited as in point.

42. The pauper lived with his maſter five years under an indenture of apprenticeſhip, then left him, *and the indentures were exchanged between the maſter and the apprentice's father, by conſent of the apprentice;* he then ſerved a new maſter in another pariſh, under a different contract, with the knowledge of his original maſter, but no other proof was ſtated of his agreement thereto. He gained no ſettlement by this ſervice, for the exchange of the indentures amounted to a cancelling of them; and beſides, if it did not, there is no conſent of the original maſter. *Rex* v. *St. Mary Kallender, Burr. Seſſ. Caſ.* 274.

43. A maſter gives an apprentice permiſſion to ſerve another for her own benefit, ſhe is hired by his recommendation, and returns to him for the laſt eight days of her apprenticeſhip. She gains a ſettlement under this ſervice as a continuation of the apprenticeſhip. *Rex* v. *Fremington, Burr. Seſſ. Caſ.* 416.

44. *A.* gave up the indentures to his apprentice's father by his requeſt, having firſt made croſſes upon it, as a token he had reſigned it; *but the apprentice was under age. B.*, who was willing to take the boy, went to *A.* and aſked, "if he took him whether *A.* would claim him again." Upon *A.*'s aſſuring him he would not, *B.* went away, ſatisfied that he might keep the apprentice *as a turnover.* This is a conſent by *A.* to a ſervice with *B.* Such ſervice is under the indenture, and gains a ſettlement. *Rex* v. *Langham, Cald.* 126.

45. An apprentice aſſigned by parol to *J. S.* ran away and lived a month in the pariſh of *C.* where her original maſter reſided, who frequently ſaw her there, and applied to *J. S.* to take her back, threatening to put him to trouble if he did not. For part of the time ſhe was too ill to be removed, but ſhe remained there afterwards for two years in health, till her apprenticeſhip expired. Here is no conſent of the maſter to gain her a ſettlement. *Rex* v. *Ideford, Burr. Seſſ. Caſ.* 821.

46. The pauper ſerved his maſter four years, who then told him to go work for himſelf, but the indentures were not cancelled nor delivered up. He afterwards worked with ſeveral maſters as a journeyman, but his original maſter did not know with whom. The queſtion was, Whether he gained a ſettlement in the place where he worked and lodged the laſt 40 days as journeyman, or as apprentice with his original maſter? And held that the indenture remaining in force, he was incapable of doing any act to gain a ſettlement without his maſter's conſent, and was ſettled where he ſerved the laſt 40 days as an apprentice. *Rex* v. *St. Luke, Burr. Seſſ. Caſ.* 542. 1 *Black. Rep.* 553.

47. The pauper was bound to a widow, who ſome time after quitted her farm, and left the apprentice there with her ſon. The ſon afterwards told him he might *go where he pleaſed, and gave him up his indentures ſubſequent to his being of age.* The indentures are

diſſolved, and no ſervice of 40 days afterwards with the maſter's conſent confers a ſettlement. *Rex* v. *Notton*, *Burr. Seſſ. Caſ.* 629.

49. The aſſent of the pariſh officers is not neceſſary to the cancelling pariſh indentures, after the apprentice has attained the age of 21; and, therefore, if after that age the apprentice purchaſes of the maſter the remainder of his time, the apprenticeſhip is diſſolved, although the indentures are neither delivered up nor cancelled, and the apprentice has a right to hire himſelf to another maſter. *Rex* v. *Harberton*, *Hil.* 26 *G.* 3. 2 *Bott* by *Conſt*, 576. *pl.* 516.

50. A pariſh apprentice ſerved his maſter five years, who then gave him up his indentures, he not being of age, and no conſent of the pariſh officers had, and recommended him to live with *W. V.*, with whom the apprentice made an agreement as a ſervant for three years, and ſerved it. This ſervice gives no ſettlement as an apprentice; for the indentures being given up, neither of the parties conſidered it as ſuch; nor as a ſervant, for the indentures exiſting in point of law, the apprentice could make no ſuch contract. *Rex* v. *Sandford*, 1 *Term Rep.* 281.

51. But where the maſter informed the apprentice he wiſhed him to get another maſter, and afterwards recommended him to *C.*, whom he ſerved two months, and then had the indentures given up to him; he gained a ſettlement by this ſervice as an apprentice. *Rex* v. *The Holy Trinity in the Minories*, 3 *Term Rep.* 605.

52. The maſter took 4*l.* 4*s.* for the remainder of his apprentice's time, who was then at the age of 22, and gave a receipt; but did not deliver up the indentures, nor were they cancelled till the end of the time at which the apprenticeſhip expired. The apprentice, after ſigning the receipt, hired himſelf for a year. *Per cur.* After paying the money, if an action had been brought by the maſter on the indentures, the pauper might have pleaded accord and ſatisfaction; or if the maſter had refuſed to deliver them on demand, he might have brought trover or detinue for them. They muſt be conſidered as non-exiſting from the time the money was paid, and the pauper gained a ſettlement by the hiring and ſervice. *Rex* v. *Harberton*, 1 *Term Rep.* 139.

53. It is not neceſſary, in order to a diſcharge, that the indentures be cancelled, it is ſufficient if they be given up. *Rex* v. *Titchfield*, *Burr. Seſſ. Caſ.* 511.

54. The pauper, then 18, and his maſter entered into an agreement, to which neither the churchwardens nor overſeers were privy; "that the pauper, on paying his maſter 12*d.* a-week, (which he was to receive as a ſatisfaction for his ſervice,) and providing for himſelf, ſhould be at liberty to work for his own benefit during the remainder of his apprenticeſhip, and the maſter ſhould find a loom for him during that time. The pauper paid the 12*d.* *per* week, and was provided with a loom, and worked for the ſame tradeſman who employed his maſter, but though with the knowledge of the maſter, yet not by his particular di-

rection and conſent. The indentures were neither cancelled nor given up. This was no diſſolution of the apprenticeſhip, and the ſervice was under it. *Rex* v. *Offerton*, *Burr. Seſſ. Caſ.* 802.

55. A maſter, in conſideration of 40*s.* paid by his apprentice, who was then 20 years old, wrote a receipt and diſcharge on the indentures, and then delivered them up. The apprentice gained no ſettlement by hiring and ſervice for a year ſubſequent to his diſcharge, and before his apprenticeſhip expired. For being an infant he could give no conſent to the diſcharge, and he had no expreſs leave of his maſter to the particular ſervice, it being general, and founded on an apprehenſion that the apprenticeſhip could be diſſolved. *Rex* v. *Auſtrey*, *Burr. Seſſ. Caſ.* 441.

56. Where a maſter agreed to permit his apprentice to go and ſerve where he pleaſed, if he would give him one guinea in hand, and two guineas more, being one guinea a-year during his apprenticeſhip, but ſaid that he would not deliver the indenture, nor diſcharge him from his apprenticeſhip, and the pauper went and ſerved Miſs *Sainthill*, and paid his maſter the guinea a-year, who told him he thought it was a good place, and hoped he would continue in it. He gains a ſettlement in the pariſh where he ſerves; for the maſter's conſent, though not expreſsly given, appears from circumſtances. *Rex* v. *Bradninch*, *Trin.* 21 *G.* 3. 2 *Bott* by *Conſt*, 594. *pl.* 532.

57. The conſent of the firſt maſter to a ſubſequent ſervice, is ſufficiently expreſſed by his giving the pauper a character. *Rex* v. *St. Mary*, *Lambeth*, *Trin.* 25 *G.* 3. *Ib. pl.* 533.

58. It is ſufficient if the conſent of the original maſter to a ſervice with another perſon be given after the ſervice begins. *Rex* v. *Bradſtone*, *Hil.* 27 *G.* 3. 2 *Bott* by *Conſt*, 599. *pl.* 535.

59. *A pariſh apprentice* bound till 24th *May*, when 21, conſents to cancelling the indentures *without the pariſh officers' aſſenting thereto.* Their aſſent held unneceſſary. *Rex* v. *Eccleſal-Bierlow*, *Burr. Seſſ. Caſ.* 652. 1 *Blac.* 592.

60. A boy is bound apprentice by conſent of his father, if the indentures are deſtroyed by conſent of the maſter, the father, and the apprentice, although an infant, the apprenticeſhip is diſſolved. *Rex* v. *Weddington*, *Burr. Seſſ. Caſ.* 766. *Ideo Que. de Thurſley Pariſh's* caſe, 3 *Vin. Abr. p.* 28. *pl.* 5.

61. The maſter ran away, the apprentice hired himſelf and ſerved a year. He gains no ſettlement, not being *ſui juris* to hire himſelf. *Buckington and Shepton Bechamp*, caſe of, *ſ.* 155. *Ld. Raym.* 1352. *Str.* 582.

62. The maſter of a pariſh apprentice dying, his widow, without any adminiſtration, aſſigned him for the remainder of his time by parol to one in another pariſh, where he ſerved 40 days. He gained a ſettlement. *Rex* v. *Eaſt Bridgeford*, *Burr. Seſſ. Caſ.* 133. *Str.* 1115. 2 *Seſſ. Ca.* 215.

63. The maſter of an infant pariſh apprentice died. The pauper, who had run away from him, hired himſelf afterwards, and ſerved a year before his apprenticeſhip expired, the executors of

his maſter taking no notice of him. He gained a ſettlement; for apprenticeſhip is a perſonal truſt between maſter and ſervant, and determines upon the death of either. *Rex* v. *Eakring*, *Burr. Seſſ. Caſ.* 320. *Say.* 88. Vide *Baxter* v. *Burfield*, *Str.* 1266. 2 *Bott* by *Conſt*, 523. *pl.* 745.

64. Apprentice bound for three years. In nine months the maſter died. He continued a fortnight with the widow, to complete work left unfiniſhed, when ſhe told him that he muſt not ſtay with her, but might go where he thought proper. The indenture was not delivered up, and he continued with his father two or three years. The ſettlement remained where he ſerved as apprentice. *Rex* v. *Chirk*, *Burr. Seſſ. Caſ.* 782.

65. A pariſh apprentice bound till 24, lived four years with his maſter, who then died. He continued in that pariſh with his executor ſeven years, who then conſented, at the pauper's requeſt, that he ſhould live with his uncle in another pariſh. The pauper ſerved there four months before he attained 24. He gained a ſettlement; for continuing with the conſent of all parties and his own is a continuation of the apprenticeſhip. *Rex* v. *Stockland*, *Dougl.* 69. *Cald.* 60.

Service as an apprentice without indentures.

66. The pauper, when 22 years old, agreed to go as an apprentice for ſix years to learn a trade, and that indentures ſhould be executed accordingly. None were executed, but he ſerved five years. This gives no ſettlement as an hiring and ſervice; for a binding as an apprentice and hiring as a ſervant cannot be converted into each other. *Rex* v. *Whitechurch Canonicorum*, *Burr. Seſſ. Caſ.* 540. *Salford* and *Storeford*, 2 *Barnard.* 39. S. P. *Rex* v. *Highnam*, *Hil.* 25 *G.* 3. 2 *Bott* by *Conſt*, 553. *pl.* 490. S. P.

67. The ſame held where there was an agreement in writing unſtamped, "that the minor, with conſent of his father, ſhould be bound apprentice for ſeven years, and be paid ſo much a-year, and no indentures executed." *Rex* v. *All Saints*, *in Hereford*, *Burr. Seſſ. Caſ.* 656.

What ſhall be evidence of indentures of apprenticeſhip when they are not produced.

68. The order ſtated an indenture of apprenticeſhip executed, ſervice under it, and conſideration-money paid, and added, that the indentures were not produced, neither did it appear whether the duty directed by 8 *Ann. c.* 9. was paid, or the indentures ſtamped. Rule to quaſh it refuſed; for it doth not ſay the duty was not paid, *&c.* and we never preſume a fraud, and after length of time parol proof of apprenticeſhip is ſufficient; for the indenture may be loſt. *Rex* v. *Eaſt Knoyle*, *Burr. Seſſ. Caſ.* 151. *Bott*, *pl.* 276. —But where, the indenture not being produced, the parol evidence induced a ſtrong preſumption that it was not ſtamped; *per cur.* Enough is not ſtated to ſhew this a binding within the act. *Rex* v. *St. Helen's* in *Abingdon*, *Burr. Seſſ. Caſ.* 292. and 735.

69. An order ſtated, that the indentures of apprenticeſhip could not be produced, and that it was not proved by parol evidence whether the ſtamp duty or the conſideration-money was paid or not. The ſeſſions did not preſume or adjudge whether it was paid or not. *Per cur.* It muſt go down again to the ſeſ-

ſions; if the ſeſſions had preſumed payment it would have been ſufficient. *Rex* v. *Badby*, 2 *Bott* by *Conſt*, 490. *pl.* 687.

70. *A.* married at the time of his being a ſoldier, when being examined agreeable to the mutiny act, he depoſed that he had gone apprentice to *B.* and lived with him four years. His wife depoſed before the ſeſſions, that ſhe had heard him ſpeak to the ſame purpoſe. This depoſition of *A.*'s, and evidence of his wife's, are ſufficient evidence to prove an apprenticeſhip. For the preſumption from a man's ſerving four years as an apprentice is, that he was bound. *Rex* v. *St. Michael's, Bath, Hil.* 13 *G.* 2 *Bott* by *Conſt*, 618. *pl.* 550.

71. Parol evidence of an indenture ſhould not be admitted without ſufficient proof that the original cannot be come at, and alſo of all thoſe circumſtances, without which it would not be good if produced. 3 *Burn*, 411.

72. Indentures were produced by the appellants, in conſequence of notice given them by the reſpondents. There were no ſubſcribing witneſſes to them, nor any proof of their execution. They ſhould be received in evidence; for being in the cuſtody of the oppoſite party, it is *primâ facie* evidence that they were duly executed. *Rex* v. *Middlezoy*, 2 *Term Rep.* 41.

73. The pauper, with his mother's conſent, indented himſelf to a mariner; but the indentures were not inrolled in the town where the apprentice was then inhabiting, nor in the next town corporate to his habitation, purſuant to 5 *Eliz. c.* 5.; nor with the collector of the cuſtoms, according to 2 & 3 *Ann. c.* 6. The indentures are voidable, not void, and he gains a ſettlement by 40 days' reſidence. *Rex* v. *Gainſborough, Burr. Seſſ. Caſ.* 586.

19 Vin. 404. (S) Orders of Settlement or Removal. Good or not in reſpect of the *Juſtices by whom made*; and how.

1. THE complaint may be by one juſtice, but the examination ought to be by thoſe two who ſign the order of removal, and in preſence of each other. *Rex* v. *Wykes, Andr.* 238. *Rex* v. *Coln St. Aldwin's, Burr. Seſſ. Caſ.* 136.

2. Objection to an order, that it did not appear that the juſtices were of the diviſion, but over-ruled, for the ſtatute is only directory. 2 *Salk.* 473.

3. An order of removal, in which the juſtices ſtate themſelves to be juſtices for a borough, or town and pariſh, is ſufficiently certain. *Rex* v. *Andover, Cald.* 373.

4. By 26 *G.* 2. *c.* 27. No order ſhall be quaſhed for not ſtating that one of the juſtices is of the *quorum*.

5. But if one be not of the *quorum* the order is bad. 3 *Burn's Juſt.* 568. 16th edit.

6. On an appeal from an order of removal by two juſtices of *A.* the ſeſſions recite that they have peruſed the charter of *A.*, and it

it not appearing thereby that either of the juſtices are of the *quorum*, they quaſh the order. Order of ſeſſions quaſhed, ſince the juſtices might have a juriſdiction, though it did not appear by the order. *Allbright and Skipton*, *Stra.* 300.

7. By 7 *G.* 3. *c.* 21. If any city, borough, town corporate, franchiſe or liberty, have one (and no more than one) juſtice actually of the *quorum*, all acts, orders, adjudications, warrants, indentures of apprenticeſhip, or other inſtruments done or executed by two or more juſtices qualified to act within ſuch city or other place, ſhall be valid, though neither of the juſtices be of the *quorum*.

8. The pariſh of *M.* lies partly in the county of *W.* and partly in the county of *L.* Two juſtices of *W.* appointed an overſeer for the pariſh, who was alſo churchwarden. The pauper was removed to that part of the pariſh which lay in *L.*, and delivered to the overſeer, and the order was held good, for the churchwardens are ſufficient officers in this reſpect. *Rex* v. *Mereval*, *Burr. Seſſ. Caſ.* 661.

9. Juſtices of the peace have no authority to remove a pauper, except to a pariſh or to a diſtrict excluſively maintaining its own poor. *Rex* v. *Swalcliffe*, *Cald.* 248. 2 *Bott* by *Conſt*, 760. *pl.* 675.

10. An order of removal ſigned by two juſtices apart from each other, one of them not being in the county, is only voidable, and the pariſh wiſhing to avoid it muſt appeal to the next ſeſſions, or they are concluded by it. *Rex* v. *The Inhabitants of Stotfold*, 4 *Term Rep.* 596. *Nol. Rep.* 66. S. C.

Sewers.

(B) Aſſeſſments. How, and the Manner of levying. 19 Vin. 417.

ORDER of ſewers for levying *ninepence per acre* on 1312 acres, to be paid to the clerk, to be applied towards *defraying charges in and about the execution* of the commiſſion, held good. For 1. The words of the ſtatute don't require that it ſhould be made on the occupier. 2. It may be made to reimburſe charges. Caſe of the *Level of Hull*, 2 *Stra.* 1127.

(C) Chargeable towards Repairs, &c. Who. 19 Vin. 419.

1. TRESPASS for diſtraining plaintiff's goods. Juſtification under 23 *H.* 8. concerning commiſſions of ſewers. It appeared on the trial, that plaintiff was occupier of lands in *H.* and benefitted by the repairs, for which the tax was aſſeſſed; that

there were antient common ſewers in *H.*, but no paſſage of boats therein; that the waters did not ebb or flow there, but they were dry at ſome ſeaſons in the year, but in wet ſeaſons they were neceſſary to conduct land waters into the *Thames* to prevent great inundations. The court of *K. B.*, though ſtrongly inclined to aſſiſt the defendant had it been *res integra*, thought the legiſlative expoſition of 3 *Jac.* 1. *c.* 14. too ſtrong to be got over, and ordered the *poſtea* to the plaintiff. *Yeaw* v. *Holland*, 2 *Black. Rep.* 717.

Note; But in Dore v. Gray, 2 Term Rep. 365. the operation of 23 H. 8. is not to be reſtrained by the recital of 3 Jac. 1. *Per* Aſhhurſt, J.

2. But where it appeared that the tide flows, and reflows over part of the *marſh* land where the work was done; that boats go from the *Thames* up the ſewer about 50 yards, and about a mile and a quarter from where the work on the ſewer was done; that unleſs the ſewers which lie above the part on which boats go are cleanſed, cleaning this latter part would be of no avail, and that the plaintiff might have ſuſtained diſadvantage if the work had not been done: the court held an aſſeſſment well laid. For it is a common ſewer, uſeful to navigation, and the work done is found to be beneficial to the plaintiff, and the public. *Dore* v. *Gray*, 2 *Term Rep.* 358.

19 Vin. 424.

(F) Proceedings.

1. SO the court refuſed to file ſome orders of ſewers returned by *certiorari*, but ſaid that the objections to them muſt be debated upon the motion to file, that they might have it in their power to ſend them back. *Rex* v. *Sir Robert Cann*, 2 *Stra.* 1263.

2. But a *certiorari* to bring up an order made by the commiſſioners for the removal of their own clerk is of common right, and not diſcretionary. *Caſe of the Commiſſioners of Sewers for Yorkſhire*, 2 *Stra.* 609.

[G]

Sheriff.

19 Vin. 432.

(C) Power as to breaking open Houſes, Cheſts, &c.

1. IN an action for breaking and entering the plaintiff's houſe, a ſheriff's officer cannot juſtify having entered under a writ of *quare clauſum fregit*, and continuing till he received a ſum of money as and by way of ſurety for the plaintiff's appearance under that writ. *Moore* v. *Beamont*, 6 *Term Rep.* 137. *Qu.* If the

the officer can attach the defendant's goods or money under such a writ. *Ib.*

2. A plea of juſtification by an officer of the ſheriff, (to treſpaſs for taking the goods of *A. B.*) that he took them under a *diſtringas* againſt *C. B.* (meaning the ſaid *A. B.*) to compel an appearance, cannot be ſupported, though it be averred that *A. B.* and *C. B.* are the ſame perſon, unleſs *A. B.* appeared in that action, and omitted to plead the miſnomer in abatement. If he did appear in that action and omitted to plead in abatement, he is concluded by it. *Cole* v. *Hindſon*, 6 *Term Rep.* 224.

3. Goods are bound by the delivery of the *fieri facias* to the ſheriff; and therefore he may execute it, notwithſtanding the death of the party afterwards, and before the return of it. *Eaton* v. *Southby*, *Willes*, 131.

(E) His Power in Executions, and how he muſt demean. 19 Vin. 434.

1. IF bailiff on a *fi. fa.* againſt the goods of *A.* take thoſe of *B.* an action of treſpaſs lies againſt the ſheriff. *Dougl.* 40.

2. But where there is a doubt reſpecting the property of the goods, the ſafeſt way is for the ſheriff to inquire by a jury in whom the property is. 4 *Term Rep.* 633. 648.

3. If on an execution againſt one of two partners the partnerſhip effects be taken and ſold, the court will order the ſheriff to pay over to the other a ſhare of the produce, proportioned to his ſhare in the partnerſhip effects, to be aſcertained by the Maſter. *Dougl.* 650.

4. Nothing can be taken in execution that cannot be ſold, as deeds, writings, *&c.* *Frances* v. *Naſh*, 1 *Burr.* 53. Bank notes, *&c.* cannot be taken in execution. *Ibid.*

5. If it appear by the ſheriff's return of a writ of execution that greater fees have been taken for the levy than are allowed by ſtat. 29 *Eliz. c.* 4. the ſheriff is liable to an action on the ſtatute for treble damages, at the ſuit of the party grieved. *Woodgate* v. *Knatchbull*, 2 *Term Rep.* 148.

6. Where two writs of *fi. fa.* againſt the ſame defendant are delivered to a ſheriff on different days, and no ſale is actually made of the defendant's goods, the firſt execution muſt have the priority, even though the ſeizure was firſt made under the ſubſequent execution. *Hutchinſon* v. *Johnſon*, 1 *Term Rep.* 729.

7. And if the perſon claiming under the ſecond execution pay the ſheriff the amount of the debt under the firſt execution for his ſecurity, the court will not compel the ſheriff to refund the money on motion. *Ibid.*

8. But where the ſheriff had given a bill of ſale to the perſon claiming under the ſecond execution, that was held to bind the ſheriff. *Rybot* v. *Peckham*, 1 *Term Rep.* 731. (notes.)

9. Though a *levari facias de bonis eccleſiaſticis* is a continuing

execution, and a levy under it may be made from time to time after it is *returnable*, till the ſum indorſed be ſatisfied, yet if it be actually returned the authority of the biſhop is at an end; therefore where ſuch a writ remained in the hands of the biſhop long after it was returnable, who ſequeſtered the profits of a vicarage, accruing as well before the return day as after; and being ruled to return the writ, returned only the amount of the ſum levied up to the *return day*; the court would not, for the purpoſe of ſecuring the plaintiff's priority, order the writ and return to be taken off the file, but would only permit the return to be amended, by inſerting the ſum levied up to the time when the writ was *actually returned*. *Marſh* v. *Fawcett*, 2 *H. Black.* 582.

10. If *A.*, being indebted to *B.* and *C.*, after being ſued to judgment, and execution by *B.* go to *C.*, and voluntarily give him a warrant of attorney to confeſs judgment, on which judgment is immediately entered, and execution levied on the ſame day on which *B.* would have been entitled to execution, and had threatened to ſue it out, the preference ſo given by *A.* to *C.* is not unlawful, nor fraudulent within the meaning of the ſtatute 13 *Eliz. c.* 5. *Holbird* v. *Anderſon*, 5 *Term Rep.* 235.

11. Goods of a teſtator in the hands of his executor cannot be ſeized in execution of a judgment againſt the executor in his own right. *Farr* v. *Newman*, 4 *Term Rep.* 621. But ſee *Whale* v. *Booth*, cited 4 *Term Rep.* 625. and the opinion of the court of *C. P.* 1 *Boſ. & Pull.* 295.

12. Where an executrix uſed the goods of her teſtator as her own, and afterwards married, and then treated them as the goods of her huſband, the court of *C. P.* held that ſhe could not maintain an action of trover againſt the ſheriff for the goods on their being taken in execution for her huſband's debt. *Quick and Wife* v. *Staines*, 1 *Boſ. & Pull.* 293.

13. Where a tenant is in poſſeſſion, and the execution is againſt the landlord, whoſe term is to be ſold, the ſheriff cannot turn the tenant out of poſſeſſion. *Semb* 3 *Term Rep.* 298.

14. If defendant is in cuſtody on a *ca. ſa.* and a *fi. fa.* is taken out, the ſheriff under that may ſeize a leaſehold; and if after the return he ſells it, though no continuance of the writ of execution, nor any writ of *venditioni exponas*, the purchaſor gains a title; and this whether the *ca. ſa.* and *fi. fa.* are in the ſame county or not. *Jeans* v. *Wilkins*, 1 *Veſey*, 195.

15. The effects acquired by an inſolvent after his diſcharge under the ſtat. 34 *G.* 3. *c.* 69. are liable to be taken in execution for a debt due before. *Spalton* v. *Meorhouſe*, 6 *Term Rep.* 366.

16. If the owner of a ſhip charge her for repairs done in *England* by an inſtrument under ſeal, upon which ſhe is afterwards ſeized by admiralty proceſs, and decreed to be ſold to ſatisfy the demand, and no appeal is made from that ſentence, but between the ſeizure and decree a writ of execution iſſues againſt the owner at the ſuit of another creditor, the ſheriff cannot take the veſſel under the writ, nor can he maintain trover againſt the officer

officer in poſſeſſion by the warrant of the Court of Admiralty. *Ladbroke* v. *Cricket*, 2 *Term Rep.* 649.

17. If *A.* lend money on the ſecurity of a ſhip, and take poſſeſſion before execution executed at the ſuit of *B.* the veſſel cannot be ſeized under *B.*'s execution. *Ibid.*

(M) Actions againſt him. Falſe Returns. 19 Vin. 441.

1. SHERIFF ſhall be obliged to return *ca. ſa.*, though he ſhews by affidavit that he had taken the defendant, and diſcharged him, on a letter from a peer, that he was his menial ſervant. *Wickham* v. *Hobart*, 1 *Burr.* 348.

2. If the ſheriff appoint a ſpecial bailiff at the plaintiff's requeſt, the latter cannot rule the ſheriff to return the writ. *Moranda* v. *Dunkin*, 4 *Term Rep.* 119.

3. If ſheriff returns defendant protected, the court will not make a rule for a better return; if inſufficient, plaintiff may apply next term for attachment. *Barnes*, 425.

4. By ſtat. 20 *G.* 2. *c.* 37. the ſheriff is not called upon to make a return unleſs required ſo to do in ſix months after the expiration of his office.

5. By the true conſtruction of the ſtatute the months are to be lunar ones, and the day on which the ſheriff goes out of office is to be reckoned part of the ſix months. *Rex* v. *Adderly*, *Dougl.* 463.

6. A ſheriff is not liable to an attachment for not returning writ, if not called upon by a rule of court within ſix months after the expiration of his office, notwithſtanding he was requeſted by the party to return it before the ſix months were expired. *Rex* v. *Jones*, 2 *Term Rep.* 1.

7. If ſheriff directs warrant to bailiff of plaintiff's nomination, and has indemnity indorſed on the writ; yet plaintiff may call for return. *Barnes*, 411.

8. Plaintiff's attorney, having blank warrants, does not carry writ to under-ſheriff till a year after the return; the court will not make a rule for return. *Barnes*, 423.

9. In what time the ſheriff muſt return a writ, and on whom the rule for a return muſt be ſerved, *vide Rex* v. *Coles*, *Dougl.* 420.

10. If under-ſheriff abſconds, the court will make a rule, that leaving copy of rule to return, at his houſe, ſhall be good. *Barnes*, 35.

11. A return made by the ſheriff, that the perſon arreſted was reſcued out of the cuſtody of the bailiff, is bad; it ſhould be, out of *his* cuſtody. *Woodgate* v. *Knatchbull*, 2 *Term Rep.* 155.

12. By rule in *B. R. Trin.* 31 *G.* 3. it is ordered, that where any ſheriff, before his going out of office, ſhall arreſt any defendant, and a *capi corpus* ſhall be afterwards returned, he ſhall and may, within the time allowed by law, be called upon to bring in the body by a rule for that purpoſe, notwithſtanding he may be

be out of office before ſuch rule ſhall be granted. 4 *Term Rep.* 379.

13. By rule in *B. R. M.* 32 *G.* 3. it is ordered, that in future all writs ſhall be returned by the ſheriff on the day on which the rule for returning the ſame ſhould expire, and in default thereof, that the plaintiff ſhall be at liberty to move for an attachment on the next day. 4 *Term Rep.* 496.

14. The court, upon the application of the ſheriff, enlarged the time for his making a return to a writ of *fi. fa.*, upon a ſuggeſtion of a reaſonable doubt whether the goods ſeized under the writ were not covered by an extent, afterwards iſſued at the ſuit of the crown for *malt* duties, under the ſtat. 28 *G.* 3. *c.* 37. *ſ.* 21. for the purpoſe of inducing the plaintiff to go into the Court of Exchequer, and there conteſt the queſtion of right with the crown. *Wells* v. *Pickman*, 7 *Term Rep.* 174.

15. The court refuſed to grant an attachment againſt the ſheriff for returning to a writ of *venditioni exponas*, that parts of the goods levied remained in his hands for want of purchaſers. *Leander* v. *Davis*, 1 *Boſ. & Pull.* 359.

16. The court will not try the truth of a return, on a motion to ſet aſide proceedings; but the party will have his action. *Bar* v. *Satchwell*, 1 *Stra.* 813.

17. If the ſheriff levies money, and makes his return at the return of the writ, when defendant has not lain two months in priſon, he muſt return *he has levied, &c.*; but if he does not make his return till after defendant has lain two months in priſon, and thereby is become a bankrupt prior to the time of the execution, he muſt return *nulla bona*. *Cooper* v. *Chitty*, 1 *Burr.* 20. *Vide* alſo 2 *Burr.* 814.

18. Where a perſon againſt whom a writ of *fi. fa.* is taken out, is in poſſeſſion of goods under a deed which was given in conſideration of an antecedent debt, and a ſmall annuity payable therefrom, the ſheriff may, notwithſtanding, return *nulla bona*, if it appear that the memorial of ſuch annuity was not regiſtered according to the directions of the annuity act 17 *G.* 3. *c.* 26., becauſe in that caſe the deed is abſolutely void. 2 *Term Rep.* 603.

19 Vin. 448. (W) Attachments againſt him. In what Caſes, and to whom directed.

1. WHERE a ſheriff has been guilty of a contempt in the courſe of a civil ſuit, and the defendant dies, an attachment may iſſue againſt the ſheriff afterwards for the prior contempt. *Rex* v. *Sheriff of Middleſex*, 3 *Term Rep.* 133.

2. A ſheriff ought not to be ruled to bring in the body until the day after the expiration of the rule to return the writ; and if he be, and be attached for not obeying it, the court will ſet aſide the attachment for irregularity. *Hutchins* v. *Hird*, 5 *Term Rep.* 479.

3. The

3. The ſheriff is liable *civiliter*, but not *criminaliter*, for the acts of his bailiffs; the meaning of which is, that he is not liable to be indicted or impriſoned, or ſubject to any corporal puniſhment for the act of his bailiffs; but where it reſts in damages, he ſhall make the party a pecuniary ſatisfaction. 2 *Term Rep.* 156.

4. A *fi. fa.* iſſued to the ſheriffs, at the ſuit of *A.* againſt *B.* On the next day another *fi. fa.* iſſued at the ſuit of *C.* againſt *B.* A levy was made under the firſt writ; but notice was given to the ſheriff by *C.* not to pay over the money to *A.*, on the ground that the judgment obtained by him was fraudulent. The ſheriffs, notwithſtanding, paid the money over to *A.*; and the officer filed the ſecond writ, with a return of *nulla bona* in the King's Bench Treaſury, inſtead of the office of the *cuſtos brevium* of this court. On this an attachment iſſued againſt the ſheriff for not returning the writ; to which attachment, (after moving the court to diſcharge it, on the ground that the writ in queſtion was filed in the wrong place, by *mere miſtake of the officer*, and that the miſtake was corrected immediately on notice of the attachment by filing it in the proper office, but with which motion the court refuſed to comply, chiefly on account of *ſtrong circumſtances of fraud* reſpecting the execution at the ſuit of *A.*) The ſheriff put in bail and was afterwards examined upon interrogatories. The prothonotary, to whom the examination was referred, having reported that neither the contempt of the court, nor the imputation of fraud, appeared to him to be done away, *the court ordered the* ſheriff immediately to pay the whole debt and coſts due to *C.*, together with the coſts of all the applications. *Rex* v. *Baker and Newman*, 1 *H. Bl.* 543.

(X) Actions againſt him. Treſpaſs, or Caſe, or Debt. 19 Vin. 449.

1. *A.* having let his houſe ready furniſhed to *B.* cannot maintain *treſpaſs* againſt the ſheriff for taking the furniture againſt *B.*, though notice were given that the goods belonged to *A.*, becauſe treſpaſs is founded on a *tort* done to the poſſeſſion, which was not in *A.* at the time. *Ward* v. *Macauley*, 4 *Term Rep.* 489. And *Vid.* 1 *Term Rep.* 480. and 5 *Term Rep.* 648.

2. A ſheriff or his officers ſhall not be treſpaſſers by relation if the firſt taking were lawful. 1 *Term Rep.* 480.

3. In an action of treſpaſs againſt the ſheriff for a wrongful act of the bailiff, it is not enough, in order to affect the ſheriff, to prove that he is a general bailiff, and had given a bond of indemnity to the ſheriff as ſuch, and to prove a copy of the warrant under which he entered and ſeized the plaintiff's goods; but the privity between the bailiff and the ſheriff muſt be eſtabliſhed in the particular tranſaction on the beſt evidence by proving the original warrant of execution from the ſheriff to the bailiff, or at leaſt by proving notice to produce it, ſo that in caſe of its not being produced,

duced, ſecondary evidence of its contents may be let in. *Drake* v. *Sykes, Bart.*, 7 *Term Rep.* 113.

4. If a bailiff on warrant on *fi. fa.* againſt *A.* takes the goods of *B.*, treſpaſs *vi et armis* lies againſt the ſheriff, even though he or his deputy does not recognize the act. *Saunderſon* v. *Baker*, 3 *Wilſ.* 309.

5. So alſo an action of treſpaſs and falſe impriſonment lies againſt the ſheriff for treſpaſs and falſe impriſonment committed by his officers in the execution of proceſs. S. C. 3 *Wilſ.* 317. *Vid. Dougl.* 40.

6. The ſheriff is not liable for ſeizing goods in execution after an act of bankruptcy committed; but if he ſells them after the commiſſion iſſues, trover lies. *Cooper* v. *Chitty*, 1 *Burr.* 20.

7. Action for breach of duty of the office of ſheriff muſt be brought againſt the *high ſheriff*, though the breach was by the default of the under-ſheriff or bailiff.

8. An action does not lie againſt the ſheriff on a promiſe to execute a bill of ſale to the plaintiff's nominee; the legal and proper mode of compelling a ſale by the ſheriff is by writ of *venditioni exponas*. *Cowp.* 406.

9. The ſheriff is liable to treble damages in an action by the party grieved, for the act of his officer in levying more than the fees allowed by the ſtat. 28 *Eliz.* 4. 2 *Term Rep.* 148.

Simony.

19 Vin. 455.

(E) What amounts to Simony.

1. A Grant of the next preſentation, or advowſon, after the church becomes actually vacant, was held void. *Biſhop of Lincoln* v. *Wolforſton*, 3 *Burr.* 1510. and 2 *Wilſ.* 197.

2. A bond of reſignation was granted in favour of a particular perſon when of age; upon his coming of age it was agreed that inſtead of reſigning, the incumbent ſhould pay an annuity to the other: the annuity being in arrear the bond was put in ſuit; but an injunction was granted by the Chancellor, not on any defect of the bond, but for the ſimoniacal uſe made of it. *Peele* v. *Capel*, 1 *Stra.* 534.

(F) Bonds of Reſignation.

1. DEBT on bond to reſign a benefice, held good, even where the condition is general, and not barely to reſign to a particular perſon. *Reel* v. *Earl of Carliſle*, 1 *Stra.* 227.

2. It

2. It was adjudged in the Houſe of Lords that a general bond of reſignation from the incumbent to the patron was void. But this was contrary to the opinion given by moſt of the judges; and Lord *Kenyon*, on the caſe being cited, declared his opinion, that if a ſimilar queſtion ſhould ariſe, the Houſe of Lords would review that deciſion. *Biſhop of London* v. *Ffytche*, 1783. Cited 4 *Term Rep.* 80.

3. A bond given by the incumbent to the patron on preſentation to reſide on the living, or to reſign if he did not return to it after notice, and alſo not to commit waſte on the parſonage-houſe, *&c.*, was held good; for it is only an additional ſecurity to compel his performance of duties he before was bound to perform. *Bagſhaw* v. *Boſsley*, 4 *Term Rep.* 78.

4. A bond conditioned to reſide on the living, to reſign in favour of the patron's ſon, and to keep the premiſes on the living in repair was held good. *Partridge* v. *Whiſton*, 4 *Term Rep.* 359.

A writ of error in *Dom. Proc.* was brought on this judgment, but is not yet determined.

Solicitor. [G]

(A) What Acts of his ſhall bind his Client. 19 Vin. 482.

THOUGH a country attorney acts by an agent in cauſes in this court, yet he is to be conſidered as the ſolicitor likewiſe, though he reſides in the country, and what is known to him is conſtructive notice to his clients. 3 *Atk.* 37. 1743. *Norris* v. *Le Neve.*

(B) Examined againſt his Client. In what Caſes.

1. COUNSEL and attornies ought not to be permitted to diſcover the ſecrets of their clients, though they offer themſelves for that purpoſe; and *this is the privilege of the client, not of the counſel or attorney*, for it is contrary to the policy of the law to permit any perſon to betray a ſecret with which the law has entruſted him. *Lindſay* v. *Talbot*, *Buller's N. P.* 284. But this rule is confined to caſes only in which the facts to which the counſel or attorney is called *have been communicated to him in the courſe of buſineſs, in inſtructing him profeſſionally reſpecting the cauſe.*

2. Thus where an ejectment was brought on an agreement, to which the defendant's attorney was a witneſs, he was ſubpœnaed but refuſed to give evidence, in conſequence of which the plaintiff

was

was nonſuited: the court granted an attachment againſt him, for a perſon atteſting any inſtrument is bound to prove its execution; nor is ſach obligation incompatible with his ſituation as attorney for the oppoſite party. *Doe* v. *Andrews*, 2 *Cowp.* 845.

3. Upon an indictment for perjury in an anſwer in Chancery the Maſter who took it was called, but could not ſpeak to the identity of the perſon; upon which the proſecutor inſiſted to examine the defendant's ſolicitor, who was preſent at putting in the anſwer, but the chief juſtice would not compel him to be ſworn, ſo the defendant was acquitted. (*Quere tamen*, for this was a fact in his own knowledge, and no matter of ſecrecy committed to him by his client.) *Rex* v. *Watkinſon*, 2 *Stra.* 1122. *Vide* the opinion of Lord *Manſfield*, in *Doe* v. *Andrews*, *Cowp.* 846. Lord *Say and Seale's* caſe, *Bull. N. P.* 284. *Cobden* v. *Kenrick*, 4 *Term Rep.* 432. agreeing with the reporter's objection, and that proof of the Maſter's hand-writing, together with that of the defendant ſubſcribed to the anſwer, is *prima facie* ſufficient evidence of his identity. *Vid. Rex* v. *Morris*, 2 *Burr.* 1189.

4. An attorney ſhall not be compelled ro *produce papers*, or ſuch like, which may have been delivered to him by his client, as evidence againſt him; for ſuch would be equally contrary to the policy of the law. *Vide Rex* v. *Dixon*, 3 *Burr.* 1687.

5. An attorney is not reſtrained by any rule of law from giving evidence of a converſation between him and his client touching the juſtice of his ſuit, after a writ of inquiry executed on an interlocutory judgment, and a compromiſe thereupon; for the purpoſe of the ſuit having been obtained, the communication could not be ſaid to have been by way of inſtruction for conducting his cauſe. *Cobden* v. *Kenrick*, 4 *Term Rep.* 431.

6. But if any matter be diſcloſed to an attorney in the cauſe, pending the cauſe, he is not permitted to give it in evidence either in that or in any other action. *Wilſon* v. *Raſtall*, 4 *Term Rep.* 753.

7. But ſuch privilege is confined to counſel, attornies, and ſolicitors, when acting in their reſpective characters. 4. *Term Rep.* 753.

8. In an action of aſſumpſit, to prove the plaintiff's demand, the plaintiff propoſed to call the defendant's former attorney to prove his having applied to ſettle the acount, his admiſſion of the debt, and an offer on the part of the defendant, his client, to pay a certain ſum on account of the plaintiff's demands. It was objected by the defendant's counſel, that this was diſcloſing the ſecrets of his client, who muſt have communicated to him the circumſtances of the caſe in conſulting him when ſued by the plaintiff; and beſides that the offer being made with a view to compromiſe the debt, was not admiſſible. *Per* Lord *Kenyon*. Conceſſions made for the purpoſe of ſettling the buſineſs for which the action is brought, cannot be given in evidence; but facts admitted I have always received. His Lordſhip admitted the evidence, and the plaintiff had a verdict on that teſtimony. *Turner* v. *Railton*, 2 *Eſp. Rep.* 474.

9. An

9. An attorney admitted as a witneſs muſt diſcloſe acts done in his preſence by his client, as execution of deeds, &c. but not private confidential converſation with him, as reaſons for making it. 2 *Veſ. jun.* 189. 1793. *Sandford* v. *Remington.*

(D) Charged in Default of the Plaintiff his Client. 19 Vin. 483.

1. AN attorney for and on behalf of his client, the defendant, promiſes to pay 500*l.* to the plaintiff; this being done by the authority of the client, the attorney is not liable, but only the client; *ſecus*, if the attorney had no authority from his client to make this engagement. 3 *P. Wms.* 277. *Eaſt.* 1734. *Johnſon* v. *Ogilby and others.*

2. An attorney on ſale of an eſtate not diſcloſing to the buyer an incumbrance, is liable to make ſatisfaction; which is different from diſcloſing the ſecrets and circumſtances of his client. 1 *Veſ.* 95. 1748. *Arnot* v. *Biſcoe.*

3. Settlement after marriage of the wife's property, reciting and in purſuance of a parol agreement before, in truſt as to part of the produce to the ſeparate uſe of the wife, as to the reſt for huſband for life, then among the children, according to the appointment of the ſurvivor, good againſt the creditors of the huſband, and their bill to ſet it aſide was diſmiſſed with coſts, and defendants were held entitled to their judgment even againſt a plaintiff, who was made ſo without authority; but whoſe whole expences above the coſts taxed of all the defendants (except the huſband) were decreed to be paid *by the ſolicitor* for the plaintiffs, the tranſaction being conſidered as a combination between the huſband, the creditors, who authorized the bill, and the ſolicitor to defraud the children. 1 *Veſ. jun.* 196. 1790. *Dundas* v. *Dutens.*

(E) Diſputes between Client and Solicitor. 19 Vin. 484.

1. AN attorney ought not to take a bond from his client for ſervices, but if a client will give it him of his own accord, it is not actually void. 2 *Atk.* 26. *June* 1739. *Walmeſley* v. *Booth.*

2. Where an attorney is retained to appear, and does not, the court will puniſh him for it: and on the other ſide, the court will not ſuffer an attorney to be changed, without leave of the court. 2 *Atk.* 27. *Ibid.*

3. The court will relieve a client againſt the extortion of an attorney, *Ibid.* and will order his bill to be taxed, although he has a mortgage to ſecure the payment of it. *Ibid.* 29.

4. A clerk in court's lending a ſolicitor money to carry on a cauſe ſhall never intitle the clerk in court to detain the papers of the client as a pledge or mortgage for the money ſo advanced to the

the ſolicitor, but he ſhall deliver them up to the party, and get his money as he can. 2 *Atk.* 114. 1740. *Grey* v. *Cockeril.*

5. Where a ſolicitor has been guilty of mal-practices, he may be degraded by applying to ſtrike him out of the roll of ſolicitors. 2 *Atk.* 173. 1741. *Anon.*

6. A ſolicitor makes an abſolute conveyance to himſelf of 1000*l.* from the plaintiff's wife, while ſhe was parted from her huſband; the conſiderations expreſſed in the deed are for ſervices done, and favours ſhewn; the bill is brought to ſet aſide the deed as obtained by fraud. Lord *Hardwicke*, on all the circumſtances of the caſe, decreed the deed ſhould ſtand only as a ſecurity for ſuch ſum as was juſtly due to the defendant. 2 *Atk.* 296. 1742. *Sir Wm. Sanderſon* v. *Glaſs.*

7. The court made an order to refer to a Maſter the affidavit of the plaintiff's own ſolicitor for impertinence. 2 *Atk.* 391. 1746. *Philips* v. *Philips.*

8. Where a ſolicitor has been negligent in managing his client's buſineſs, this court can grant an attachment againſt him, and the courts of law exerciſe the ſame juriſdiction over attornies. 3 *Atk.* 568. 1747. *Floyd* v. *Nangle.*

9. A ſolicitor who was in diſburſe for his client was ordered to be paid out of a duty decreed to an adminiſtrator, and a lien upon it, before the bond-creditors of the deceaſed; nor can the adminiſtrator controvert this rule, by inſiſting on applying the aſſets in a courſe of adminiſtration. 3 *Atk.* 720. 1749. *Turwin* v. *Gibſon.*

10. Bill by the executrix of an attorney, for money due from the defendant for buſineſs done by her huſband as his attorney, and to be paid what ſhould be found due on account, and ſtates the delivery of a bill by the plaintiff. Defendant demurred to the relief, and for cauſe ſhewed, that the remedy was at law, and that an act of parliament had pointed out a ſummary way, *viz.* ſtat. 2 *G.* 2. *c.* 23. *ſ.* 22. Demurrer allowed. 3 *Atk.* 740. 1751. *Parry* v. *Owen.*

11. Gift to an attorney after the cauſe is over, without any diſtreſs, not ſet aſide; otherwiſe if during the cauſe. 2 *Veſ.* 259. 1751. *Oldham* v. *Hand.*

12. Petition by a ſolicitor to be paid his bill of coſts in taking out a commiſſion of lunacy out of the fund of the lunatic's eſtate, and not to be obliged to come under the commiſſion of bankruptcy againſt him who took out the commiſſion of lunacy, granted. 2 *Veſ.* 407. 1751. *Ex parte Price.*

13. Solicitors bills are now ordered to be taxed upon the client's ſubmitting to pay what ſhall be found due, without bringing the money into court, as formerly. 2 *Veſ.* 451. 1752. *Anon.*

14. A ſolicitor proſecuting to a decree has a lien on the eſtate recovered *in the hands of the perſon recovering* for his bill, but not in the hands of the heir. *Ambl.* 102. 1750. *Barneſley* v. *Powell.*

15. An

15. An attorney concerned in ſuing out a fraudulent commiſſion of bankruptcy, ordered to pay coſts. 1 *Veſ. jun.* 394. 1791. *Ex parte Thorp.*

16. Where any part of a ſolicitor's bill relates to buſineſs done in this court, the whole may be taxed, although part of the buſineſs was for other perſons jointly with the perſons applying. 3 *Bro. Cha. Rep.* 233. 1791. *Margerum* v. *Saunderſon.*

17. Securities taken by an attorney from his client during the time of their connexion as ſuch for a preſent, the balances of accounts ſettled for money lent and laid out, coſts and buſineſs done, and the price of a horſe ſold; void as to the preſent: and the plaintiff ſubmitting to pay what ſhould be actually due, the accounts were opened as to the whole; the horſe having been ſold ſoon after he was purchaſed from the attorney for a much leſs price than was ſtipulated, an inquiry was directed as to his value. 4 *Bro. Cha. Rep.* 351. 1793. *Newman* v. *Payne*, 2 *Veſ. jun.* 200. S. C.

18. Upon an act of bankruptcy by lying two months in priſon joint and ſeparate commiſſions iſſued; the former being eſtabliſhed, the latter ſuperſeded; the attorney employed by the bankrupt, and in ſuſtaining the latter againſt the former has no lien on the papers delivered to him by the bankrupt after the arreſt. 2 *Veſ. jun.* 285. 1793. *Ex parte Lee.*

For more of *Soliciter* in general ſee *Attorney*, *Maintenance*, and other proper titles.

Specialty.

(A) What ſhall be ſaid a Specialty.

19 Vin. 487.

THE recital of a debt in a deed under hand and ſeal, is no ſpecialty debt, for it muſt ſtand on its own force. 1 *Veſ.* 313. 1749. *Lacam* v. *Mertins.*

For more of *Specialty* in general ſee *Executors*, *Heirs*, and other proper titles.

Statutes.

19 Vin. 495.

(B) The Commencement.

1. WHERE a duty was impoſed on exportation of rice which before had been exported duty free; rice exported after the firſt day of the ſeſſion, but before the actual paſſing of the bill, was held liable. *Attorney-General* v. *Panter*, 6 *Bro. P. C.* 553.

2. An annuity was granted by *A.* to *B.* on the 14th *January* 1777, during the ſeſſion of parliament. *Four months afterwards* an act paſſed, in the ſame ſeſſion, making all ſecurities for annuities void, unleſs regiſtered *within* 20 *days* after the granting thereof; this annuity, not being regiſtered within 20 days, was held void. *Latleſs* v. *Pattens*, 4 *Term Rep.* 660. S. P. *Hall* v. *Whalley*, 4 *Term Rep.* 662. (note.)

3. 33 *G.* 3. *c.* 13. enacts, That when the operation of an act of parliament is not directed to commence from any time ſpecified within it, the clerk of the parliament ſhall indorſe on it the day on which it receives the royal aſſent, and that day ſhall be the date of its commencement.

19 Vin. 496.

(C) General Statutes. What ſhall be ſaid ſuch whereof the Court will take Notice without pleading.

1. IT is not ſettled whether the ſtatute 23 *H.* 6. as to ſheriffs' bonds be a public act or not, and therefore it is generally ſet out in pleading. A miſrecital is fatal where the party tied himſelf to exactneſs by the word "*aforeſaid*," *Boice* v. *Whitaker*, *Dougl.* 97

2. But this act was held afterwards to be clearly a public act, and to be taken notice of by the court. *Samuel* v. *Evans*, 2 *Term Rep.* 569.

19 Vin. 521.

(E. 6) Conſtruction of Statutes.

1. NO proceedings can be purſued under a repealed act of parliament, although the act attached upon the circumſtances of the caſe, and the proceedings were begun before the repeal, unleſs by ſpecial exception. *Miller's* caſe, 1 *Black. Rep.* 451.

2. I

2. It is a general rule that ſubſequent ſtatutes which add cumulative penalties, do not repeal the former ſtatutes. Therefore where by 48 *Ed.* 1. the ſtandard of ſilver was regulated, and other ſubſequent ſtatutes add penalties on deviating from it. Statute 8 *W.* 3. *c.* 8. *ſ.* 9. aboliſhed or ſuſpended the old ſtandard, and eſtabliſhed a new, with forfeiture on breach of it: the 6 *G.* 1. *c.* 11. *ſ.* 1. revives the old ſtandard, and continues the new penalties as affixed to the old ſtandard; and the 12 *G.* 2. recites the 28 *Ed.* 1. as a ſubſiſting law, and adds new penalties. The ſtatute 28 *Ed.* 1. is not repealed. *Rex* v. *Jackſon*, *Cowp.* 298.

3. The ſtatute 1 *J.* 1. *c.* 22. gives certain penalties, to be recovered (*ſect.* 46.) by action of debt in the courts at *Weſtminſter*, and *ſect.* 50. gives an indictment in the court of gaol delivery, *&c.* in the ſame caſe. The informer may ſue in debt in the courts at *Weſtminſter*, notwithſtanding the 21 *J.* 1. *c.* 4., for that only reſtrains the proceedings on penal ſtatutes in the ſuperior courts, where the informer might before then have ſued in the inferior as well as the ſuperior courts by action, bill, plaint, ſuit, or information. *Shepman* v. *Herbert*, 4 *Term Rep.* 109.

4. When the legiſlature 7 & 8 *W.* 3. *c.* 34. excepted the evidence of Quakers upon *criminal caſes* where their *oath* is neceſſary—caſes technically criminal are meant—and their affirmation is evidence in penal actions. *Atcheſon* v. *Everitt*, *Cowp.* 391.

5. Where the preamble is ſpecial and particular, but the enacting part contains expreſs words, more large and general, it ſhall extend it beyond the preamble. *Pattiſon* v. *Bankes*, *Cowp.* 543.

6. A recital of one ſtatute in the preamble of another, is a legiſlative explanation of the firſt. *Ibid.*

7. A lord of a hundred or wapentake cannot grant a deputation to a gamekeeper; for the words lords of manors *or other royalties*, 22 & 23 *Car.* 2. *c.* 25. mean other royalties of the ſame ſpecies as manors; as honours, baronies, fees, *&c.* and this is further ſhewn by the ſubſequent acts *in pari materia*, which are to be taken together and explain one another. *Earl of Ayleſbury* v. *Pattiſon*, *Dougl.* 30.

8. Where by the terms of a bill for incloſing the waſtes of a manor, a certain portion was to be allotted to the lord, in lieu of his right and intereſt in the ſoil, and the reſt was to be allotted to the ſeveral tenants in fee, diſcharged from all cuſtomary tenures, *&c.* a ſaving clauſe, reſerving to the lord all ſeignories incident to the manor, and all rents, fines, ſervices, *&c.* and all other royalties and manerial juriſdictions whatſoever, will not reſerve mines under thoſe allotments to the tenants, although it appear there was a ſubſiſting leaſe of thoſe mines, at the time the act paſſed, granted by the lord of the manor. *Townley* v. *Gibſon*, 2 *Term Rep.* 701.

9. Where a ſtatute has created an offence but annexed no penalty, it is indictable as an offence, at common law; and if a penalty is added by a ſeparate, ſubſtantive clauſe, the proſecutor may indict on the firſt clauſe, and need not ſue for the penalty.

The King againſt *Harris*, 4 *Term Rep.* 205. S. P. *R.* v. *Robinſon*, 2 *Burr.* 799.

10. The preamble cannot control the enacting part of a ſtatute, which is expreſſed in clear and unambiguous words; but if any doubt ariſe on the words of the enacting part, the preamble may be reſorted to, and compared with the reſt of the act, in order to collect and explain the general intention of the legiſlature. *Creſpigny* v. *Wittenoom*, 4 *Term Rep.* 793.

11. The 7 *G.* 3. *c.* 37. veſts lands embanked from the *Thames* in the owners, free from taxes; a ſubſequent land-tax bill, though containing general words, will not make them liable; for it could not be the intent of the legiſlature to exempt from the land-tax only during one year, while the then exiſting land-tax bill continued. *Williams* v. *Pritchard*, 4 *Term Rep.* 2.

Stocks.

20 Vin. 1.

(A) Caſes relating to Stocks in Companies.

1. DEBT upon a bond—defendants pray oyer of the condition, and then pleaded 7 *G.* 2. *c.* 28. ("An act to prevent the infamous practice of ſtock-jobbing,") and that the plaintiff and *R.* were jointly concerned in certain contracts, *&c.* That the plaintiff, contrary to the ſtatute, voluntarily gave to divers perſons large ſums of money, *&c.* amounting to 3000*l.*, *&c.* for compounding and making up differences, for not delivering ſtock, *&c.* and for not performing contracts, *&c.* (following the words of the act.) And that this bond was given by the defendants for ſecuring the *repayment* of 1500*l.* (being the moiety of the ſaid ſum of 3000*l.*) to the plaintiff by the ſaid *R.* On demurrer to this plea, the court of *B. R.* held it ill, and no defence, for this caſe is not within the act, being a bond merely for money lent to another to fulfil a prohibited contract; and it is like the caſes where a man lends money to be lent upon uſury, or to pay a gaming debt. *Faikney* v. *Reynous and Richardſon*, 1 *Black. Rep.* 633. 4 *Burr.* 2069. S. C.

2. The perſon whoſe name is entered in the *South Sea* Company's books is with regard to them the proprietor, and they have no right to inquire who the true proprietor is, when the truſt does not appear. *Stockdale* v. *The South Sea Company*, 2 *Atk.* 141.

3. Stock is very often transferred by brokers without the principal's being mentioned, and yet he may maintain an action againſt the perſon to whom the ſtock was transferred. *Per Hardwicke C.* in *Liſſet* v. *Reave*, 2 *Atk.* 394.

4. Upon

4. Upon the marriage of the plaintiff it was covenanted, that her fortune was to be laid out by the truſtees under a ſettlement before marriage, in the purchaſe of land, to be ſettled to ſeveral uſes, with an expreſs proviſo, that the truſtees, till a proper purchaſe could be found, ſhould, by the huſband's direction or conſent *inveſt the truſt-money in government funds or other good ſecurities.* The plaintiff's fortune lying dead, and no proper purchaſe offering, 8500*l.* thereof was inveſted, by the direction of her father and her huſband, in the purchaſe of 7090*l.* *South-Sea* ſtock. This ſtock being greatly fallen, and the father and huſband apprehending a greater fall, it was ſold by the ſurviving truſtee, and 1369*l.* 5*s.* was loſt by the difference between buying and ſelling it. A bill being filed by the plaintiff, after her huſband's death, to have the benefit intended her from her portion, and her huſband's covenant in the ſettlement previous to her marriage; one queſtion was, on whom the loſs of the 1369*l.* 5*s.* ſhould fall. And Lord Chancellor *Hardwicke* was of opinion, that the loſs had not happened from a diſpoſition of the truſt-money according to the terms of the truſt; for neither *South-Sea* ſtock nor *Bank* ſtock are conſidered as good ſecurity, becauſe they depend upon the management of their governors and directors, who may trade away the whole ſtock, and therefore they are ſubject to loſſes. That *South-Sea* and *Bank* annuities are of a different conſideration; becauſe the directors have nothing to do with the principal, and are only to pay the dividends and intereſt till government pays off the capital. Neither does the word "*funds*" alter the caſe; for it muſt relate to ſuch funds as are undoubted ſecurity. But as to the manner of making this deficiency good to the truſt eſtate, his lordſhip was of opinion that it muſt come out of the huſband's eſtate, as it was done either with his concurrence or ſubſequent aſſent. *Trafford* v. *Boehm*, 3 *Atk.* 440.

Subpœna.

(A) Of the ſerving a Subpœna.

20 Vin 21.

1. AN order need not be ſerved which is made on hearing counſel on both ſides. *Moſeley* 202. 1729. *Bambridge* v. *Caſtel.*

2. If a cauſe be adjourned for want of parties, though the defendant be ſerved with the order, he muſt be ſerved with a ſubpœna to hear judgment. *Moſeley* 226. 1729. *Knowles* v. *Spence.*

3. No proceſs can be ſerved on a priſoner committed at the ſuit of the crown without leave, though if he once appears, you

may go on againſt him, but the Chancellor having been one of the commiſſioners of *oyer and terminer*, before whom the priſoner in this caſe had been tried, made an order upon the keeper of *Newgate* to admit a perſon to ſerve the priſoner with the ſubpœna. *Moſeley*, 237. 1729. *Anon.*

4. Where infants are parties to a cauſe, and the mother ſecretes them, ſo as they cannot be ſerved, a ſervice of the ſubpœna upon the mother is ſufficient, as ſhe is the natural guardian of the children. 2 *Atk.* 70. 1740. *Smith* v. *Marſhall.*

5. If the miniſter of a pariſh prevents an order for the defendant's appearance being publiſhed, purſuant to the 5 *G.* 2. he is indictable for a contempt. 2 *Atk.* 114. 1740. *Burton* v. *Mattons.*

6. Though contemptuous words were ſpoken of the *ſubpœna*, and the perſon ſerving it ſeverely beaten, yet as theſe facts were proved only by the oath of a ſingle witneſs, the court would not, in the firſt inſtance, order him to ſtand committed, but made a rule upon him to ſhew cauſe why he ſhould not ſtand committed. 3 *Atk.* 219. 1745. *Anon.*

7. If a defendant be ſerved, and before the return of the writ, he inſtructs a clerk to ſearch if any bill be filed, he may prefer coſts unleſs it be an injunction cauſe. *Hind.* 77.

8. A ſubpœna may be made returnable, and ſerved on the ſame day it is ſealed. *Hind.* 80.

9. If a ſubpœna be againſt huſband and wife, ſervice on the huſband is good ſervice on him and his wife, and ſervice on the wife is good ſervice on the huſband, if the body of the ſubpœna be left with her under ſeal at the huſband's place of abode, becauſe it is preſumed to be ſufficient notice to the other: but leaving the label with the wife has been doubted if good ſervice on the huſband. *Hind* 84.

10. A counterfeit *ſubpœna* does not oblige, and whoſoever ſerves it, if he knows it, miſbehaves himſelf; and an attachment will go againſt him. *Hind.* 86.

11. If a defendant be a member of the houſe of commons, an office copy of the bill ſigned by the proper *ſix clerk*, or his deputy, muſt accompany the writ, and may be ſerved perſonally; or, which is more convenient, and moſt uſual, by leaving the *ſubpœna* under ſeal, and a copy of the bill, at the defendant's dwelling-houſe, or place of reſidence, with one of the family. *Hind.* 87.

12. In caſes where perſons have withdrawn themſelves beyond the ſeas, or otherwiſe abſconded, *to avoid the proceſs of the court*, the court may fix a day for their appearance under the 5 *G.* 2. *c.* 25. and the defendant not appearing the bill may be taken *pro confeſſo*: but Lord *Hardwicke* was of opinion that it was not ſufficient to make an affidavit that the party making it *was informed and believed* that the defendants withdrew themſelves to *Ireland* to avoid being ſerved with the proceſs of the court, but it muſt be ſet forth by whom the party depoſing was ſo informed. *Hind.* 89.

13. The

13. *The ſtat.* omits the caſe of a defendant who has been ſerved with a *ſubpœna* and neglects to enter his appearance, and avoids the proceſs of contempt. Plaintiff in ſuch predicament is left to the ordinary method of iſſuing proceſs to a ſequeſtration, and holding the lands ſequeſtered; for the defendant muſt have appeared or been in cuſtody before a decree *pro confeſſo* againſt him can be made; all that the court can do is to grant an injunction grounded upon ſuch ſequeſtration. *Hind.* 90.

14. *Quære.* Whether a *ſubpœna* can regularly be ſerved out of the juriſdiction? and whether a foreigner can be ſerved in a foreign country. *Hind.* 90.

15. Defendant reſiding abroad, authorized *Turton* and *Summerton*, two attornies, to receive a ſubpœna for him, and to enter an appearance; plaintiff filed his bill, and applied to *Turton* and *Summerton* to accept the *ſubpœna* and appear, which they refuſed to do, and the court would not compel them. *Hind.* 91. *Willings* v. *Loman.* 1781.

16. Defendant lived at *Epſom*, and being a barriſter had chambers in the *Temple*, but had little or no buſineſs. A ſubpœna returnable *immediately* was moved for, upon an affidavit, ſtating that the defendant's place of abode was at *Epſom*, but that he reſided in the *Temple*. Motion refuſed, as it did not appear that his place of abode was in the *Temple*. *Hind.* 92.

17. Defendant, who was a member of parliament, had a houſe at *Southampton*, but no town reſidence, was ſerved with a *ſubpœna* returnable *immediately*, in *London*, at a friend's houſe where he was upon a viſit. Defendant moved to ſet a ſequeſtration aſide, which had been awarded for default of appearance, on the ground of irregularity, he having no place of reſidence in town: motion refuſed, as the court would not believe that a member of parliament, whoſe duty it was to attend during the ſeſſion, had no reſidence in town, and the reſidence above ſtated was ſufficient. *Eaſt India Company* v. *Sir Thomas Rumbold*, *Hind.* 92.

18. Defendant having a town reſidence and a country reſidence, a ſubpœna returnable immediate was ſerved, by leaving the body under ſeal at her houſe in town, ſhe being then at her country reſidence above ten miles from town; ſhe appeared *gratis* as in a town cauſe, and obtained a commiſſion to take her anſwer, and ſix weeks' time to return it. Upon motion by plaintiff to ſet aſide the order, Lord *Thurlow* ſaid, that her appearance *gratis* as in a town cauſe did not make it ſo, and refuſed the motion. *Earl of Leiceſter* v. *Perry.* 1782. *Hind.* 406.

19. The Defendant dying after ſervice of the *ſubpœna* to hear judgment, whether upon a bill of revivor a new *ſubpœna* to hear judgment is neceſſary. 5 *Veſ. jun.* 305. 1800. *Byne* v. *Potter.*

For more of *Subpœna* in general ſee *Bill of Revivor*, *Coſts*, and other proper titles. See alſo *Service of Rules and Orders.*

Sunday.

20 Vin. 62. (B) Service of Proceſs, Rules, &c.; in what Caſes *good* on *Sunday*.

1. A Contempt for non-performance of an order of the court of Chancery, is a breach of the peace, and a man who has committed ſuch a contempt may be taken upon an attachment on a *Sunday*. 1 *Atk.* 58. 1749. *Ex parte Whitchurch.*

2. Notice of a motion to be made on *Monday*, muſt be ſerved on *Friday*, *Sunday* being no day. *Maxwell* v. *Phillips*, *June* 22, 1801.

[G] Superſedeas.

20 Vin. 66. (A) Superſedeas. What Thing will be a Superſedeas. Writ of Error.

1. TWO things are requiſite to make a writ of error a *ſuperſedeas* of execution, *viz.* the allowance, (*i. e.* the delivery of the writ to the clerk of the errors,) and putting in bail. If the writ of error be allowed before judgment, the time for putting in bail (four days) runs from the judgment; if after judgment, from the time of the allowance. *Gravall* v. *Stimpſon*, 1 *Boſ.* & *Pull.* 478.

2. Allowance of writ of error, on a judgment by *nil dicit*, is ſo entirely a *ſuperſedeas* to a ſubſequent writ of execution, and all proceedings grounded thereon againſt the bail, that all may be ſet aſide on motion. *Vid. Barnes*, 205. 209. 376. 1 *Term Rep.* 279.

3. Writ of error, though ſued before judgment, is a *ſuperſedeas*. *Morſoot* v. *Chivers*, 1 *Stra.* 631.

4. But it can have no effect till the judgment is actually ſigned. 1 *Term Rep.* 279.

5. A writ of error is no *ſuperſedeas* till allowance or notice of it. *Meriton* v. *Steevens*, *Willes's Rep.* 271.

6. A writ of error, ſued out *after* final judgment, and before execution executed, is a *ſuperſedeas* of execution *from the time of its allowance*, and not from the time of ſervice of the allowance. 1 *Burr.*

1 *Burr.* 340. *Capron* v. *Archer*, *Willes's Rep.* 271. *Barnes*, 205. 1 *Beſ. & Pull.* 478. provided bail, when requiſite, be put in and perfected within four days *after the allowance.*

7. Where a writ of error is brought againſt good faith, or where it manifeſtly appears, either from the confeſſion of the parties themſelves, or from the admiſſion of the attorney of the party who ſues out the writ of error, or from expreſſions equivalent to an admiſſion, that it is brought for the mere purpoſe of delay, it is holden to be no *ſuperſedeas*. *Vid. Cales* v. *Weſt*, 2 *Term Rep.* 189. *Mitchell* v. *Wheeler*, 2 *H. Black.* 30. and *Goodwin* v. *Hammond*, there cited note (*a*). 3 *Term Rep.* 79. 4 *Ibid.* 436. 5 *Ibid.* 669.

8. Error was brought of a judgment in the *Marſhalſea* court, and error in law aſſigned, and the judgment affirmed. Then a writ of error *coram nobis*; which the court ſaid could not be allowed without leave, and therefore held it no *ſuperſedeas*. *Horne* v. *Buſhell*, 2 *Stra.* 949.

9. When a *ca. ſa.* is returnable againſt the principal on a particular day, before which a writ of error is allowed and ſerved, that operates as a *ſuperſedeas* to any proceedings againſt the bail, although the *ca. ſa.* has not lain four days in the office before the allowance of the writ of error. *Perry* v. *Campbell*, 3 *Term Rep.* 390.

10. If defendant, a priſoner, brings error, and puts in bail, he ſhall have *ſuperſedeas*; for though writ of error ſhould be *non-proſſed* for want of tranſcribing, bail are liabe.

(N) For what Cauſes.

20 Vin. 96.

1. WHERE a priſoner, who had been ſurrendered on diſcharge of his bail, and afterwards removed to the *Fleet*, without giving any notice to the plaintiff, was charged in execution as a priſoner in the *King's Bench*, the court granted a *ſuperſedeas*, for the priſoner is not bound to give notice of his removal, but the plaintiff muſt take notice of it at his peril. *Filkes* v. *Allen*, 2 *Stra.* 1153.

2. The rule that a priſoner, who is once ſuperſedeable, always remains ſo, only holds ſo long as he continues in the ſame cuſtody, and under the ſame proceſs; ſo that if a priſoner on meſne proceſs were ſuperſedeable for any irregularity, he cannot take advantage of that after he is charged in execution, if he had any opportunity of applying on that ground before he was charged in execution. *Roſe* v. *Chriſtfield*, 1 *Term Rep.* 591.

3. If the declaration be not delivered againſt a priſoner, and an affidavit thereof duly made and filed, (where the defendant is in cuſtody of the ſheriff, *&c.*) or if the plaintiff do not proceed to trial or final judgment, or cauſe the defendant to be charged in execution in due time, the defendant may be diſcharged out of cuſtody by writ of *ſuperſedeas* or otherwiſe, according to the courſe of the court, on filing common bail by *bill*, or entering a common appearance

appearance by *original*, unless upon notice given to the plaintiff's attorney good cause be shewn to the contrary. *R. Hil.* 26 *G.* 3. And see *R. E.* 5 *W. & M. Reg.* 3. *f.* 6. *R. T.* 2 *G.* 1. *Say. Rep.* 111.

4. Defendant, a prisoner, after judgment brought error, put in bail, and applied to be discharged on *supersedeas*, which was granted. *Barnes*, 499.

5. After the return of the *exigent*, but whilst it remained in the hands of the sheriff of *London*, and before defendant was returned outlawed, the court made a rule, that a *supersedeas* to the *exigent* should be allowed, on payment of costs. *Barnes*, 323.

Supplicavit.

(A) In what Cases granted, and how.

20 Vin. 99.

1. THE Master of the Rolls would not order a *supplicavit* to be marked because there was no affidavit produced of the husband's circumstances as a measure for him to go by. *Moseley*, 191. 1729. *Ex parte Lewis.*

2. But the Chancellor ordered a *supplicavit* to be marked without affidavit, only upon inquiry of the husband's circumstances from the solicitor of the wife. *Mosely*, 198. 1729. *Ex parte Gibson.*

3. One taken on a *supplicavit* and continued in prison a year without any fresh threatening, ought to be discharged. 3 *P. Wms.* 103. 1731. *Ex parte Sir Richard Grosvenor.*

4. The obtaining a *supplicavit* does not justify a wife's elopement from her husband: for it is a security taken for her on supposition that they are to live together. 3 *Atk.* 550. 1747. *Head* v. *Head.*

Surety.

(B) Surety. Chargeable. How far.

20 Vin. 101.

1. *A.* and *B.* are bound in bond jointly and severally to *J. S.* he may elect to sue them jointly or severally; but if he sue them jointly he cannot sue them severally, for the pendency of one suit

ſuit may be pleaded in abatement of the other. 3 *P. Wms.* 405, 1735. *Ex parte Rowlandſon.*

2. A releaſe to one obligor is a releaſe to both, in equity as well as law. 1 *Atk.* 294. 1738. *Bower* v. *Swadlin.*

3. But if there be an aſſignment of the bond in truſt for others precedent to the releaſe, though without conſideration, it will be a material queſtion whether the obligee could releaſe, or whether it could operate to the releaſe, as he is truſtee in the aſſignment, every man being ſuppoſed to be conuſant of a deed to which he is a party. *Ibid.*

4. The plaintiffs were two ſureties with Mrs. *Hudſon* in an adminiſtration-bond to the commiſſary of *York*, who exhibited an inventory there of the inteſtate's effects; the defendant, *Benſon*, being a creditor by bond of the inteſtate in the penalty of 600*l.* brought an action againſt the adminiſtratrix, who pleaded ſhe had no aſſets *ultra* 54*l.* *Benſon*, not ſatisfied with the inventory, procured the commiſſary to aſſign to him the adminiſtration-bond, and brought three actions on it; one againſt her, and one againſt each of the ſureties, and aſſigned for breach of the bond, that Mrs. *Hudſon* had not exhibited a true inventory; no defence, and judgment by default; the adminiſtratrix and the ſureties are bound by the verdict, and no excuſe, it was without defence; the verdict ordered to ſtand as a ſecurity for ſo much as the account to be taken on the inventory ſhould fall ſhort to ſatisfy the principal and intereſt on the bond. 3 *Atk.* 248. 1745. *Greenſide* v. *Benſon.*

5. Though a bond be joint only, both obligors are bound in equity; and ſo of a ſurety, if that equity is not rebutted. 2 *Veſ.* 106. 1750. *Biſhop* v. *Church.*

6. One obligor in a joint bond dies, the other becomes bankrupt; though the legal lien is gone, if there be no partiality or colluſion by the obligee, equity will ſet up his demand againſt both heir and executor of the deceaſed, but the real eſtate comes in only in default of perſonal aſſets. 2 *Veſ.* 371. 1751. *Biſhop* v. *Church.*

7. Principal and ſurety on a note payable by inſtalments; principal is diſcharged under the Inſolvent Debtors' Act, after one payment was become due. Bill by creditors, and decree againſt the ſurety, and he to have ſatisfaction over againſt the aſſets of the principal for what was due for the firſt payment, and the common decree for ſatisfaction over for the other payments. *Ambl.* 61. *Trin.* 1745. *Sir Daniel O'Carrell's* caſe.

8. A creditor giving the principal debtor further time for payment releaſes the ſurety. 2 *Bro. Cha. Rep.* 579. 1789. *Niſbet* v. *Smith.*

9. Obligee in a bond with a ſurety, without communication with the ſurety, takes notes from the principal and gives further time; the ſurety is diſcharged. 2 *Veſ. jun.* 540. *April* 1795. *Rees* v. *Berrington.*

10. *Creditor*

10. Creditor ſues the principal by direction of the ſurety, but without his privity agrees to ſtay execution; the ſurety is diſcharged. *Ibid.* 544.

11. "I return *A.* his bond" in a will, is not a releaſe but a legacy, and having lapſed, the bond remains in force againſt a ſurviving co-obligor. 3 *Veſ. jun.* 231. 1796. *Maitland* v. *Adair.*

12. A ſurety to the *Eaſt India Company* diſcharged by payment of a balance to the principal, under an erroneous ſettlement by the officers of the company without their authority or knowledge; the *Eaſt India Company* having compelled payment from a ſurety in *India* by their power over him, as one of their ſervants, without an account of proceeding againſt the principal, (though ſolvent,) and otherwiſe under harſh circumſtances, he was reſtored to the ſame ſituation by a decree for the repayment with intereſt at 5*l. per cent.* upon giving ſecurity for the re-payment, in caſe of a future ſuit by the company he ſhould be held liable; the court would not, upon circumſtances, give *Indian* intereſt. 4 *Veſ. jun.* 824. *July* 1799. *Law* v. *Eaſt India Company.*

20 Vin. 104.

(D) Surety. How far relieved in Equity.

1. *H.* and *W.* were principals in a bond, and *E.* a ſurety only; the obligee agrees with *H.* to take four notes drawn by different perſons, and payable at future days, in lieu of the bond; but compelled *H.* to ſign an agreement in his own name, and in the names of *W.* and *E.* to pay the deficiency, if the notes ſhould not produce the whole principal and intereſt on the bond; before the notes became due *H.* and *W.* were bankrupts: the obligee having received only 500*l.* on the notes, brings his bill for the reſidue of the principal and intereſt againſt *E.* as a co-obligor. The court held that the plaintiff was not entitled to any relief againſt *E.* 3 *Atk.* 91. 1744. *Skip* v. *Huey.*

2. Joint bond held ſeveral againſt creditors in the adminiſtration of aſſets. 3 *Veſ. jun.* 573. *Jan.* 1798. *Burn* v. *Burn.*

3. Joint bond held ſeveral in bankruptcy. *Ibid.* 575.

20 Vin. 104.

(E) Surety favoured, how; to enable him to recover his Debt.

1. WHERE a joint obligor dies, his repreſentatives ſhall be charged *pari paſſu* with the ſurviving obligor in the payment of the bond. 1 *Atk.* 90. 1739. *Primroſe* v. *Bromley.*

2. Where there is a principal and ſurety, and the ſurety pays off the debt, he is entitled to have an aſſignment of the ſecurity to enable him to obtain ſatisfaction for what he has paid above his own ſhare. 1 *Atk.* 135. 1744. *Ex parte Criſp.*

3. An

3. An aſſignment of the bond by the obligee cannot be inſiſted on by the ſurety who pays the money. 1 *Veſ.* 339. 1749. *Gammon* v. *Stone.*

4. Co-obligee, unleſs paid, is not compellable to lend his name to ſue the ſurvivor. 2 *Veſ.* 372. 1751. *Biſhop* v. *Church.*

5. Though the obligation and penalty be gone, the condition is conſidered as an agreement to pay. *Ibid.*

6. If one obligor pays, and ſues the other at law in the name of the obligee, payment may be pleaded; but not payment by a ſtranger, as is the repreſentative of a deceaſed obligor in the joint bond. *Ibid.* 372.

7. A ſurety admitted under the bankruptcy of his principal, as to all recovered againſt him, and his coſts, there being a ſurplus. 2 *Veſ. jun.* 302. 1793. *Ex parte Mills.*

8. Any act of the obligee that may injure a ſurety is laid hold of in his favour. 3 *Veſ. jun.* 573. 1798. *Burn* v. *Burn.*

For more of *Surety* in general, ſee *Bail*, and other proper titles.

Surety of the Peace. [G]

(A) Lies for and againſt whom, and in what Caſes. 20 Vin. 107.

1. WHEN a perſon has juſt cauſe to fear that another will burn his houſe, or do him a corporal hurt, or that he will procure others to do him ſuch miſchief, he may demand the ſurety of the peace againſt ſuch perſon. 1 *Hawk.* 127. So, according to the better opinion, if he be threatened to be impriſoned. *Ibid.*

2. But ſurety of the peace ſhall not be granted to a man, becauſe he is afraid that the perſon will do harm to his ſervants or cattle. *Lamb.* 83.

3. It hath however been ſaid that a man may have ſurety of the peace againſt one who threatens to hurt his his wife or child. *Dalt.* 206.

4. A wife may demand ſurety of the peace againſt her huſband, threatening to beat her outrageouſly; ſo alſo a huſband may have it againſt his wife. *Stra.* 1207. *Rex* v. *An. Rob. Bowes*, 1 *Term Rep.* 696. *Rex* v. *Earl Ferrers*, 1 *Burr.* 635.

(B) How obtained and granted; and Punishment of wrongfully obtaining it.

1. THE articles of the peace must be verified by the *oath* of the exhibitant; therefore the *affirmation* of a Quaker is not sufficient. *Rex* v. *Green*, 1 *Stra.* 527. *Sed vide Atcheson* v. *Everitt*, *Cowp.* 388.

2. A peer or peeress cannot be bound over in any other place than the court of *King's Bench* or *Chancery*. 4 *Comm.* 251.

3. The court will not permit the truth of the allegation to be controverted by the defendant, but will order security to be taken immediately, if no objections arise upon the face of the articles themselves. *Stra.* 1202.

4. But if on application for the assistance of the court to enforce the subsequent process the articles should manifestly appear, from corroborating affidavit of the defendant, to have been a *malicious*, *voluntary*, and *gross perjury*, the court will resist the application and commit the offender.

5. Articles of the peace ought to be exhibited in the neighbourhood, that the security may be given there. The court, therefore, would not receive articles of the peace, where the parties lived at a distance in the country, because no previous application had been made to a justice in the neighbourhood. *Rex* v. *White*, 2 *Burr.* 780.

6. And if the court do receive them, the secondary may indorse the attachment in the sum required, and order a justice to take the security. 2 *Burr.* 1039.

[G] # Suspicion.

20 Vin. 150. ## (A) What is good Cause of Suspicion to detain a Man.

1. THE common fame of the country is such a ground of suspicion as will justify an arrest. But it seems that it ought to appear upon evidence in an action brought for such an arrest that such fame had some probable ground. 3 *Hawk.* 161. *Vide* the case of *Ledwick* v. *Catchpole*, *Cald. Cas.* 291. in which it was decided that a constable or other peace officer may justify an arrest for felony on *probable evidence* that a felony has been actually committed, although no positive charge be made.

2. It appears to be decided by the case of *Samuel* v. *Payne and others*, on a motion for a new trial in *East. Term* 20 *G.* 3. that constables

ſtables and their aſſiſtants are juſtified in arreſting a man upon a given charge of felony although the goods charged to have been ſtolen are not found by them upon the ſearch warrant, and the jury find that no felony was committed. The ſtrict rule of law, "That if a felony has *actually* been committed, any man, upon "reaſonable probable grounds of ſuſpicion, may juſtify appre-"hending the ſuſpected perſon to carry him before a magiſtrate, "but that if no felony has been committed, the apprehenſion of "a perſon cannot be juſtified by any body," was conſidered as inconvenient and narrow, becauſe if a man charge another with felony, and require an officer to take him into cuſtody and carry him before a magiſtrate, it muſt be moſt miſchievous that the officer ſhould be bound firſt to try, and on his peril exerciſe his judgment on the truth of the charge. He that makes the charge ſhould alone be anſwerable. The officer does his duty in carrying the accuſed before a magiſtrate, who is authoriſed to examine, and commit or diſcharge. 1 *Douglas*, 359.

(B) Pleadings.

PREVIOUSLY to the ſtatute 24 *G.* 2. *c.* 44. whoſoever would juſtify the arreſt of an innocent perſon by reaſon of ſuch ſuſpicion, muſt not only have ſhewn that he ſuſpected the party himſelf, but muſt alſo have ſet forth the cauſe which induced him to have ſuch a ſuſpicion, that he might appear to the court to have had a ſufficient ground for his proceeding. But by that ſtatute officers are now admitted to plead the general iſſue, and to give the ſpecial matter in evidence.

Taxes.

(B) What and who liable.

1. PREMISES were let at 120*l. per annum*, but by improvements were of more value; and ſince theſe improvements were taxed at 150*l. per annum*. The tenant would have deducted the whole land tax, but the court held that the landlord ſhould only allow the proportion which 120*l.* bears to 150*l.* upon the whole. *Yeo* v. *Leman*, 2 *Stra.* 1191.

2. The ſalary of an exciſeman was held liable to taxation in that county where he lives and keeps his books, although he execute his duty in other counties alſo. *Purret* v. *Weeks*, *Stra.* 417.

3. Houſes built on land embanked from the *Thames* in purſuance of 7 *G.* 3. *c.* 37. which veſts thoſe lands in the owners, free from taxes, are not liable to be aſſeſſed to the land-tax impoſed by 27 *G.* 3. though ſuch latter act is conceived in general terms. *Williams* v. *Pritchard*, 4 *Term Rep.* 2.

(F) Collectors. Their Power, and how puniſhed for Miſdemeanors, &c.

1. A Seizure being made, and ſentence for the captors given in the Admiralty Court of *Quebec*, but reverſed at *Halifax*, and an action of treſpaſs brought by the owner; the captor produced a certificate of probable cauſe, given after the action brought; and held good. *Sullivan* v. *Montague*, *Dougl.* 106.

2. A revenue officer ſeized goods as forfeited, which were not liable to ſeizure, and took money of the owner to releaſe them. The owner was allowed to recover this money from the officer; and a month's notice, under the 23 *G.* 3. *c.* 70. *ſ.* 30. was held not neceſſary. *Irving* v. *Wilſon*, 4 *Term Rep.* 485.

3. 28 *G.* 3. *c.* 37. *ſ.* 24. If any information ſhall be brought to trial on account of the ſeizure of any goods as forfeited by any act relating to the cuſtoms or exciſe, and it ſhall appear to the judge that there was a probable cauſe of ſeizure, he ſhall certify the ſame on the record, and on ſuch caſe the claimant ſhall not have any coſts of ſuit, nor ſhall the ſeizor be liable to any action on account thereof; and if an action is brought againſt any perſon for ſuch ſeizure, and the judge on the trial thereof ſhall certify that there was a probable cauſe for ſuch ſeizure, the plaintiff ſhall not be entitled to more than 2*d.* damages, and no coſts of ſuit.

4. *Sect.* 25. No writ ſhall be ſued out nor proceſs ſerved upon any officer of the cuſtoms or exciſe, or their aſſiſtants, for any thing done in execution of their duty, until a month after notice thereof in writing.

5. *Sect.* 26. The ſaid officers or their aſſiſtants, to whom ſuch notice ſhall be given, may, within a month thereafter tender amends to the party, or, if not accepted, plead ſuch tender in bar of the action; and if ſuch tender ſhall be found ſufficient by the jury, the defendant ſhall have a verdict.

6. *Sect.* 27. In ſuch action the plaintiff ſhall not produce at the trial any evidence not contained in the notice, nor ſhall recover, unleſs he prove himſelf to have given ſuch notice.

7. *Sect.* 28. In caſe ſuch officer, &c. ſhall neglect to tender amends, or ſhall have tendered inſufficient amends, he may, at any time before iſſue joined, pay any ſum he ſhall ſee fit, into court.

8. *Sect.* 23. Actions againſt officers, &c. for any thing done in execution of their office, muſt be commenced in three months, and laid in the county where the facts took place. The defendant may plead the general iſſue, and give the ſpecial matter in evidence; and if he has a judgment, ſhall have treble coſts.

Tail.

(E) Equity. Agreement of Tenant in Tail carried into Execution againſt the Iſſue. 20 Vin. 267.

TENANT in tail obtains an act of parliament enabling him to charge the eſtate; the rights of the remainder men were not excepted in the ſaving clauſe; yet held they were barred. *Ambl.* 697. 1771. *Weſtley* v. *Kiernan.*

(G) Equity Creditors relieved againſt the Iſſue in Tail, in what Caſes. 20 Vin. 269.

1. *A.* Tenant in tail, remainder to *B.* in tail, join in a mortgage, and bound to raiſe money: after the death of *A.* his creditors cannot come upon *B.*'s remainder in eaſe of *A.*'s perſonal eſtate. 1 *Veſ.* 251. 1749. *Robinſon* v. *Gee.*

2. *A.* tenant in tail, ſubject to an incumbrance, ſuffers a recovery of part, ſells part, and exchanges part of the eſtate: the land taken in exchange is not ſubject to a contribution of the incumbrance, the whole of which muſt be borne by the remainder. 1 *Veſ.* 261. 1749. *Kirkham* v. *Smith.*

3. Tenant in tail, but reſtrained by act of parliament from ſuffering a recovery, pays off portions charged on the eſtate, without taking an aſſignment, he ſhall be a creditor for the ſums paid, which ſhall be raiſed for his adminiſtratrix. 3 *Bro. Cha. Rep.* 120. 1790. *Counteſs of Shrewſbury* v. *Earl of Shrewſbury*, 1 *Veſ. jun.* 227. S. C.

Time.

(A) Time. Day. In what Caſes the Day ſhall be taken *excluſive.* 20 Vin. 266.

DEMISE to *J. P.* for three lives, *habendum* from the day of the date thereof. Reſolved *per cur.* that this is a freehold to commence *in futuro*, and therefore void. *Denn ex dem. Warren* v. *Fearnſide*, 1 *Wilſ.* 176.

20 Vin. 269.

(A. 2) Day. How to be computed.

1. EJECTMENT. The leſſor of the plaintiff claimed by deſcent from his anceſtor, who died on the 1ſt day of *January* 1771. The demiſe was laid in the declaration on the ſame 1ſt of *January*, to hold from 31ſt *December* then laſt paſt. It was contended, that as the anceſtor was alive at five in the morning, and the law admits of no fraction of a day, in fiction of law he was alive the whole day, and ſo the leſſor of the plaintiff's title did not accrue until the beginning of the next day. But *per tot. cur.* If my anceſtor die at five in the morning, I enter at ſix, and make a leaſe at ſeven, it is good; for *fictio juris neminem lædere debet*. *Roe ex dem. Wrangham* v. *Herſey*, 3 *Wilſ.* 274.

2. *Vide Rex* v. *Adderley*, *Dougl.* 446. *Poſt* (C) *pl.* 3.

3. Treſpaſs for ſeizing, &c. a quantity of tobacco. Plea not guilty. The defendants were exciſe officers, and 23 *G.* 3. *c.* 70. enacts, "That no writ ſhall be ſued out againſt any perſon acting in the execution of that ſtatute *until one calendar month next after notice* in writing ſhall have been delivered to him. The notice was ſerved on the defendants 28th *April*, and the writ ſued out 28th of *May*. It was objected at the trial, that the writ was ſued out a day too ſoon, and *Gould* J. being of that opinion, nonſuited the plaintiff. But *B. R.* ſet it aſide, becauſe where computation of time is to be made *from* an act done, the day on which the act is done, is to be included in the reckoning. *Caſtle & al.* v. *Burditt & al.* 3 *Term Rep.* 623.

20 Vin. 271.

(C) *Month.* How the Month ſhall be computed.

1. THE contract was to deliver ſtock one month after; the tender was according to the calendar month. But *Pratt* C. J. ruled it muſt be a lunar month, though many witneſſes were called to prove the courſe of the alley to be, to reckon according to calendar months. *Jocelyn* v. *Hawkins*, 1 *Stra.* 446.

2. Debt on bond. The defendant pleaded, that the money was lent from 24th *Auguſt* to 24th *May*; and on evidence it appeared the bargain was for nine months. It was objected *pro quer.* to be a variance, becauſe months muſt be taken to be lunar, and then it does not come ſo far as the 24th *May*. But *Gilbert* C. B. thought it well enough, the general underſtanding being calendar months in caſes of this nature. *Titus* v. *The Lady Preſton*, 1 *Stra.* 652.

3. Order for a month's notice to plead. No plea being put in, on the 29th day after, plaintiff ſigned judgment. Motion to ſet aſide the judgment as irregular, becauſe the order ſhall be conſtrued to extend to a calendar month as moſt beneficial to the party. But by Lord *Mansfield* C. J. a month in law is always a lunar

lunar month, except in *quare impedit* (*a*). And by *Denison* J. In all temporal cases we go by lunar months; in ecclesiastical by solar. *Talbot* v. *Linfield*, 1 *Black. Rep.* 450. 3 *Burr.* 1455. S. C.

(*a*) *Nota* Because it is manifest from the words of 13 Ed. 1. c. 5. that by six months *half a year* is *there* meant.

4. By 20 G. 2. *c.* 37. *s.* 2. "No sheriff shall be liable to be "called upon to make a return of any writ or process un- "less he be required to do so within six months after the ex- "piration of his office." This means six *lunar* months after the expiration of his office, and the day on which he goes out of office is to be reckoned as part of the six months. *The King* v. *Adderley*, *Dougl.* 446.

Toll.

(B) *Thorough Toll* and *Toll Traverse. In what Cases payable.*

20 Vin. 289.

1. TOLL through the king's highway cannot be taken by prescription without a good consideration be alleged, for it is to deprive the subject of his common right and inheritance, to pass through the king's highway, which right of passage was before all prescriptions. But toll traverse, or for going through a man's private land, may be prescribed for without any consideration. *Per* Lord *Camden* C. J. in *Truman* v. *Walgham*, 2 *Wils.* 296.

2. *Assumpsit* for tolls. Plea, the general issue. The jury find a special verdict, that the liberty of passing over the soil, and the taking of toll for and in consideration of such passage were both immemorial, and that the soil and the tolls were before the time of legal memory in the hands of the crown, though severed since, and that the place for passing over which the toll is claimed has been from time immemorial a public highway, and repaired by the inhabitants of the county. This is a toll *traverse*; for the claim of toll being stated to be co-eval with the right of passage, it shall be presumed that the use of the soil was originally granted to the public in consideration of such toll, and such grant is a sufficient consideration to support the demand. *Lord Pelham* v. *Pickersgill*, 1 *Term Rep.* 660.

3. The repair of *several* streets in a borough is not a sufficient consideration for a prescription to take toll thorough in *every* street there. *Id. ib.*

20 Vin. 295.

(G) Toll due; in what Cases and how.

1. IN *assumpsit*, the plaintiffs declared upon a right by prescription to have and receive a certain toll upon exportation of corn and grain from their port of *G. Y.* to parts beyond sea, and that the defendant exported certain quantities of corn, *&c.* without paying the toll. Demurrer and cause assigned, that the plaintiffs have not shewn or alleged, *any benefit*, which the said corporation perform, or are bound to perform to the public, or any *cause or consideration* upon which their pretended prescription is founded. Judgment for the plaintiff; for the making of a port is itself a *consideration*; and as it may never require repair, it is not necessary to shew it. *Mayor of Yarmouth* v. *Eaton*, 3 *Burr.* 1402. And *The Corporation of Exeter*, v. *Trinlet*, *Tr.* 32, 33 *G.* 2. there cited, *Ib.* 1405.

2. A prescription as lord of the manor for toll of all goods landed *within* the manor, in consideration of *repairing* a *wharf* within the manor; not confining it to the wharf. Held good upon motion in arrest of judgment after verdict for the plaintiff; for every body that pays has a benefit. If they go to the wharf they have the benefit of it, and if they land their goods elsewhere, they land them upon the plaintiff's private property. *Cotton* v. *Smith*, *Cowp.* 47.

3. In trespass, Defendant justifies a distress for toll, and sets forth a custom in *D.* to hold a fair on *St. Aug.* day, and take toll, and that 2 *Eliz.* reciting this, had granted them two new fairs, *with all profits, commodities, emoluments, liberties, and free customs, ad hujus modi ferias pertinen.* On demurrer the justification was held ill; for toll is not of common right, and therefore not within the words of reference; and being new fairs, upon which no toll is granted by express words, the custom can't extend to them. *Holloway* v. *Smith*, 2 *Stra.* 1171.

20 Vin. 297.

(I) Remedy.

1. A general *indebitatus assumpsit* for tolls, held good upon special demurrer. *Seward* v. *Baker*, 1 *Term Rep.* 616.

2. Where the vendor of corn took a chamber for the purpose of keeping his corn in a town in the market of which toll was due, and on a market day shews a sample of his corn kept there to a customer, who agrees for a certain quantity, to be delivered within a month, at his mill, which is ten miles off the town, and afterwards, on a market day, the corn is sent merely through the market *on its way to the mill*; a distress cannot be taken for the toll of this corn so sold, for on the day of the trespass complained of, it was not brought within the borough, *to be sold in the market.*

If this mode of ſale is a fraud upon toll, the remedy is by ſpecial action on the caſe. *Blakey* v. *Dinſdale*, *Cowp.* 661.

3. Upon this laſt point ſee alſo the opinion of Lord *Kenyon*, C. J. in *Moſely* v. *Pearſon*, 4 *Term Rep.* 107.

(K) Writ and *Declaration*. Good or not.

1. AN action will not lie on the writ *de eſſendo quietum de theolonio* until the plaintiff's goods are diſtrained for the toll. *Mayor, &c. of Lynn Regis* v. *The Mayor, &c. of London in error from C. B.* 4 *Term Rep.* 130. *Vide* 1 *H. Black. Rep.* in *C. B.* 206.

2. The plaintiff declared upon a preſcription to take *toll in ſpecie for goods ſold in a market*. This is ſupported by evidence of a right to toll *for goods brought into the market and there ſold*; without ſhewing any right to toll *for goods ſold in the market* (as by ſample,) without being brought there; for the expreſſion, "*a ſale in a market*," imports that the goods ſold are brought into the market, and ready to be delivered to the purchaſer. And the claim of a toll in ſpecie out of goods ſold, neceſſarily implies, that the commodity in reſpect to which the toll ariſes is brought into the market. *Moſely, Bart.* v. *Pearſon*, 4 *Term Rep.* 104.

(L) Pleadings.

20 Vin. 299.

TRESPASS for ſtopping plaintiff's waggon, and ſeizing and carrying away one pair of his iron gear. Defendant juſtifies the taking as a diſtreſs under a preſcription for toll of and for every cart and waggon coming from out of any other lordſhip or manor, and paſſing over any part of the manor of *Gainſborough*, in conſideration of repairing *divers and many ſtreets belonging to the ſaid town or borough, &c.* This plea is ill, for the waggon might be paſſing over ſome ſtreet not repaired by the defendant when the diſtreſs was taken, and the toll being demanded of the ſubject in the king's highway for paſſing *there*, the ſubject ought to have a benefit (*i. e.* in paſſing over that highway,) "for paying it." *Truman* v. *Walgham*, 2 *Wilſ.* 296.

Vide *Cuſtom, Market, Preſcription*, &c.

Trade.

20 Vin. 321. (B) *What* is *an uſing* a Trade within the 5 *Eliz. c.* 4.

1. DEBT on 5 *Eliz. c.* 4. for exerciſing the trade of a brewer without having ſerved an apprenticeſhip. A ſpecial verdict found that the defendant and one *C.* were partners during the time charged; that *C. did ſerve an apprenticeſhip, &c.* though the defendant never did; that *C.* was a working brewer, and had a ſalary allowed him as ſuch previous to a diviſion of the profits; that the defendant *never exerciſed the trade himſelf*, but only ſhared the profits and ſtood the riſk. This is not an exerciſe of the trade within the 5 *Eliz.* The act ought to be taken ſtrictly, being contrary to the general right given by the common law, and the preſent caſe is neither within the letter or the meaning of the ſtatute; for the perſon who *is ſkilled* acts every thing, and receives *no directions from the defendant*; his perſonal ſkill therefore makes no difference, ſince the trade is exerciſed by one who is ſkilled. *Raynard* v. *Chaſe*, 1 *Burr.* 2. 2 *Wilſ.* 40. S. C.

2. In an action upon this ſtatute it appeared the defendant was only a journeyman. Lord *Mansfield* C. J. nonſuited the plaintiff; and on a motion for a new trial, the court were of opinion that the defendant did not *exerciſe* the trade within the meaning of the act; for it meant to prevent the *maſter* from *ſetting up* the trade, being *unqualified* for it, or *employing unqualified perſons*; but it was not intended to give a penalty againſt the journeyman himſelf. *Beach qui tam* v. *Turner*, 4 *Burr.* 2449.

3. By 17 *G.* 3. *c.* 33. Dyers in *Middleſex*, *Eſſex*, *Surry*, and *Kent*, may employ journeymen who have not ſerved apprenticeſhips.

4. By 17 *G.* 3. *c.* 55. So may all hatters.

20 Vin. 325. (C) *Service.* What is a Service ſufficient.

1. ON a caſe reſerved for the twelve judges by *Adams* B. they were unanimouſly of opinion, that exerciſing a trade ſeven years without any proſecution with effect, was a ſufficient qualification. *Waller qui tam*, v. *Hatton*, 1 *Black. Rep.* 233.

2. A man may exerciſe as many trades as he has worked at or ſerved to ſeven years. *French qui tam* v. *Adams*, *C. B.* 2 *Wilſ.* 168.

(F) In what Caſes Securities given in *Reſtriction of Trade* are good. 20 Vin. 324.

1. DEBT on bond for 200*l.* The condition, after reciting (that in conſideration that *A.* would take *B.* as an aſſiſtant in his buſineſs as a ſurgeon for ſo long time as it ſhould pleaſe *A.*; *B.* had agreed not to practiſe on his own account for 14 years within 10 miles of the place where *A.* then lived,) was that *B.* would not exerciſe the buſineſs, *&c.* within that diſtance, *&c.* This bond is good in law. *Davis* v. *Maſon*, 5 *Term Rep.* 118.

2. So articles not to ſet up the trade taught within the bills of mortality, on the penalty of 44*l.* held good. *Clarke* v. *Comer*, *caſ. temp. Hard.* 53.

(K) Indictments or Informations, as to uſing Trades. 20 Vin. 331.

1. AN indictment on 5 *Eliz. c.* 4. which averred it to be a trade uſed at that time in *Great Britain* inſtead of *England*, was quaſhed upon motion. *Rex* v. *Hatch.* *Rex* v. *Pariſh*, S. P. 1 *Stra.* 552.

2. An indictment for exerciſing the trade of a ſalter, held well, though not mentioned in 5 *Eliz. c.* 4. But the indictment was quaſhed for the fault mentioned in the laſt caſe. *Rex* v. *Liſter*, 2 *Stra.* 788.

3. An information *qui tam* for exerciſing the trade of a baker at the *pariſh* of *S.*, is good, for it is not neceſſary by the act that it ſhould be laid in a city, market town, or corporation. *Ball qui tam* v. *Cobus*, 1 *Burr.* 366.

4. Indictment on this ſtatute againſt a *tanner* needs not aver the want of other qualifications, which by *ſubſequent* ſtatutes entitle perſons to exerciſe that trade without apprenticeſhip; but ſuch other qualification muſt be ſhewn by defendant, either by plea, or in evidence. *Rex* v. *Pemberton*, 2 *Burr.* 1035.

5. Information *qui tam* on 5 *Eliz.* brought in the court of quarter ſeſſions in *London*, for exerciſing the trade of a tallow chandler, not having ſerved an apprenticeſhip. It was removed by *certiorari* into *B. R.* and defendant found guilty. On a motion in arreſt of judgment for want of juriſdiction in the ſeſſions, the court of *B. R.* was of opinion that they had juriſdiction, and diſcharged the rule. *Farren qui tam* v. *Williams*, *Cowp.* 369.

Trade and Navigation.

20 Vin. 335.

(A) Cases relating to Trade and Navigation.

1. LORD *Mansfield* said he knew of no cases that prohibit even a subject from trading with the enemy except two—one in 2 *Roll. Abr.* 173. the other a note given him by Lord *Hardwicke* of a reference to all the judges in King *William*'s time, who were unanimously of opinion that carrying corn to the enemy in time of war was a misdemeanour at common law. *Gist* v. *Mason*, 1 *Term Rep.* 84.

2. By the maritime law, trading with an enemy is cause of confiscation in a subject, provided you take him in the act; but it does not extend to a neutral vessel. *Id. ib.*

3. A trade is not transmissible; it is put an end to by the death of the trader. *Per* Lord *Mansfield*, C. J. in *Barker* v. *Parker*, 1 *Term Rep.* 295.

4. Though it is true that acts of parliament relating to trade in general are public acts, yet a statute which relates only to a certain trade is a private one. Therefore the court cannot take notice of any part of it but what is set forth. *Per Buller* J. in *Kirk* v. *Howill*, 1 *Term Rep.* 125.

5. The unloading ballast into an *hopper* with *intent* to carry it out to sea, is an offence against the express provision of 19 *G.* 2. *c.* 22. which says "that it shall not be discharged but only upon land."

6. But putting it into an hopper, in order to carry it upon land would not be so.

7. Nor shifting it out of one ship into another without intention to drop it any where. *Bruckleſbank* v. *Smith, Esq.* 2 *Burr.* 656.

8. By stat. 23 *G.* 2. *c.* 13. Any person soliciting, *&c.* any artificer in any manufacture of *Great Britain* or *Ireland* to go abroad, forfeits 500*l.* and imprisonment for one year; second offence 1000*l.* and two years imprisonment.

9. Persons exporting tools in the silk or woollen manufacture forfeit the tools and 200*l.*; captain taking on board 100*l.*; captain of a king's ship 100*l.* and cashiered; custom-house officer signing cocket, 100*l.* and forfeits his place.

Traverſe. [G]

(A) Notes and Rules. 20 Vin. 339.

1. IT is agreed that where the words "*virtute prætenti, per quod*," and the like, introduce a conſequence or inference from the preceding matter, they are not traverſable, but the preceding matter is alone traverſable. *Beal* v. *Simpſon*, 1 *Lord Raym.* 408. *Rex* v. *Mayor of York*, 5 *Term Rep.* 66.

2. And this rule holds much ſtronger where theſe words introduce a concluſion of law, for every traverſe muſt regularly be of matter of *fact*, and not of law; for the court alone is to judge of the law. *Richardſon* v. *Mayor of Orford*, 2 *H. Black.* 182.

3. But it is ſaid that matter of law connected with fact, or rather matter of right reſulting from facts, is traverſable. 2 *Black Rep.* 776. 3 *Wilſ.* 234. S. C.

4. If there are ſeveral material facts alleged, the party may traverſe which of them he pleaſes. *Griffith* v. *Williams*, 1 *Wilſ.* 338.

5. If the traverſe be not to the ſubſtance and point of the action, the other party may either paſs it by and tender another traverſe, or demur ſpecially for this cauſe. 4 *Term Rep.* 440.

6. A traverſe ought not to be taken, but where the thing traverſed is an *iſſuable* fact. *Rex* v. *Lyme Regis*, 1 *Dougl.* 154.

7. Although it is a general rule that a traverſe muſt conclude with a verification; yet it may, and when it compriſes the whole ſubſtance of the plea, it ought to conclude to the country. 1 *Dougl.* 96. (note 10.) *Ib.* 427. (n. 1.)

8. Matter of record cannot be traverſed. *Franſhaw* v. *Morriſon*, 1 *Ld. Raym.* 1140.

9. The traverſe ſhould be certain, and neither too large nor too narrow, that is, ſhould deny ſo much as is material and no more. The proper words for beginning a traverſe are *abſque hoc*; but any words tantamount are ſufficient, as *et non*.

10. There cannot be a traverſe after a traverſe, where the firſt was apt and material; but it is otherwiſe where the firſt traverſe was not the point of the action, or immaterial.

11. The king is allowed to take a traverſe after a traverſe, where his title appears by office, or other matter of record.

20 Vin. 430.

(B) Of the Inducement to a Traverſe.

1. IN *quare impedit*, the plaintiff having ſtated his title in his declaration, the defendant pleads his own title in bar, in deducing which ſeveral incidental points are alſo ſtated; the plaintiff in the replication ſets forth eſſential matter, which would fully avoid the defendant's title, but does it by way of *inducement* to a traverſe of one of thoſe incidental points, with which traverſe the replication concludes; the defendant in the rejoinder takes no notice of the traverſe in the replication, but *traverſes the matter of inducement* which precedes it. This rejoinder is good, and may well *paſs by the traverſe*, in the replication, that traverſe being an immaterial one. *Thrale* v. *Biſhop of London*, 1 *H. Black.* 376.

2. Matter of inducement is not traverſable. *Anon.* 1 *Comyns's Rep.* 229. 2 *Stra.* 1177. 1 *Wilſ.* 6. But it is traverſable, if material.

3. The inducement to a traverſe is inſufficient where the traverſe is a thing immaterial. *Newland* v. *Collins*, 1 *Ibid.* 302.

4. Good matter alleged in the inducement to a traverſe cannot be taken advantage of. 2 *Ld. Raym.* 1140.

5. Every traverſe ought to have a proper inducement, and if that be bad, the traverſe is inſufficient. But the inducement to a traverſe does not require much certainty.

20 Vin. 382.

(P. a) Neceſſary in what Caſes.

1. IF plaintiff in his replication makes ſeveral averments, which the defendant does not traverſe in his rejoinder, to which plaintiff demurs, judgment ſhall be for plaintiff; for whatever is materially alleged muſt be traverſed, or it is always taken to be admitted. *Nicholſon* v. *Simpſon*, 1 *Stra.* 297.

2. If a cuſtom be pleaded, another cuſtom repugnant to it cannot be replied without a traverſe. *Kenchin* v. *Knight*, 1 *Wilſ.* 253.

3. If to treſpaſs on the common called *A.* the defendant plead that *A.* and *B.* commons lie open to each other, and then preſcribe for a right in both commons, the plaintiff muſt traverſe the *whole* preſcription; for all preſcriptions are entire, and when pleaded, the adverſe party cannot deny a part only. *Morewood* v. *Wood*, 4 *Term Rep.* 157.

4. Whenever any material fact is alleged in any pleading, which, if denied, will, upon iſſue joined, decide the cauſe one way or other, if the adverſe party plead a matter inconſiſtent with, and contrary to ſuch allegation, he muſt traverſe it. *Waltham* v. *Sparks*, 1 *Ld. Raym.* 41.

5. In treſpaſs, if defendant juſtifies at another place than is laid in the declaration, a traverſe is neceſſary. *Benjamin* v. *Howell*, 1 *Wilſ.* 81.

6. Where

6. Where intereſt is in land, or claimed out of it, the plaintiff cannot reply *de injuria ſua propria*, but ought to traverſe the right. *Cockrell* v. *Armſtrong*, 2 *Comyns's Rep.* 582.

7. If the defendant make cognizance as bailiff to *J. S.* the plaintiff may traverſe his being bailiff, for this is different from treſpaſs *quare clauſum fregit*, for there, if the defendant juſtify an entry by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff ſhall not traverſe the command, becauſe it would admit the truth of the reſt of the plea, *viz.* that the freehold was in *J. S.*, which would be ſufficient to bar his action. But in treſpaſs *de bonis aſportatis, ex gr.* for taking the plaintiff's ſheep, if the defendant juſtify the taking them *damage feaſant* as ſervant to *J. S.* the plaintiff may traverſe the command or authority: for though *J. S.* had a right to take the cattle, yet a ſtranger who had no authority from him will be liable. *Bull. N. P.* 45.

(Q. a) Where there is a confeſſing and avoiding.

20 Vin. 385.

IN *quare impedit* by the king for the next turn of a living, void by promotion, defendant pleads, that the crown preſented *D.*, who is ſince dead, and that he himſelf is now preſented, *&c. parſon imparſonee*, with a traverſe that the church is ſtill vacant by the promotion; this is a confeſſion and avoidance, and therefore bad; it may be paſſed over and iſſue taken upon the avoidance. 2 *Stra.* 837.

(W. a) Of an immaterial Traverſe.

20 Vin. 390.

1. TO treſpaſs for fiſhing on the plaintiffs' fiſhery, the defendant pleaded that the place is an arm of the ſea, in which every ſubject has a right to fiſh. The plaintiff in his replication claimed an excluſive right by preſcription, traverſing the general right; it was held by the court of *K. B.* that the defendant ought to take iſſue on the traverſe, and not to traverſe the preſcriptive right claimed by the plaintiff, for that the traverſe was a material one, and would put in iſſue the true queſtion in diſpute between the parties. *Orford* (*Corporation*) v. *Richardſon*, 4 *Term Rep.* 437.

2. But on error in the Exchequer Chamber, it was determined that the plaintiff's traverſe of the general right was bad, and that the defendant therefore might well paſs by it in the rejoinder, and traverſe the preſcriptive right of the plaintiff ſtated in the replication. *Richardſon* v. *Orford*, (*Corp.*) 2 *H. Black.* 182.

3. In treſpaſs and falſe impriſonment, defendant juſtifies under a proceſs out of the ſheriff's court *quæ eſt eadem, &c.* and traverſes being guilty *aliter vel alio modo*; this traverſe held ill on ſpecial demurrer,

demurrer, it being immaterial and unneceſſary, the *quæ eſt eadem* being a ſufficient traverſe. *Courtney* v. *Satchwell*, 2 *Stra.* 694.

4. If the defendant pleads to a bond that part of the ſum, *ſcil.* 1500*l.* was won by gaming, and plaintiff traverſes the 1500*l.* it is bad. *Colborn* v. *Stockdale*, 1 *Stra.* 293.

20 Vin. 408. (L. b) Traverſe upon a Traverſe. Neceſſary, or good or not.

IF the firſt traverſe be not to the point of the action, a traverſe on a traverſe may be allowed. So, in prohibition, for that defendant had petitioned the court of common council, who had no juriſdiction, which belonged to the court of mayor and aldermen, the defendants plead, that the common council have the juriſdiction, *abſque hoc*, that the juriſdiction is in the court of mayor and aldermen; the plaintiff replies, that the common council have it not, and concludes to the country. Defendants demur, for that is a departure, and plaintiff ought to have taken iſſue on the traverſe. But *per cur.* the firſt traverſe was immaterial. Judgment *pro quer.* *King* v. *Bolton*, afterwards affirmed in parliament. *Stra.* 117.

Trees.

20 Vin. 416. (B) Diſputes between Lord and Freeholders, &c. as to Trees.

1. *QUÆRE.* Whether by the cuſtom of a manor the timber can belong to a tenant? 4 *Veſ. jun.* 703. 1799. *Deuch* v. *Bampton.*

2. *Quære.* Whether upon waſte by a copyholder by cutting timber the lord can bring trover; particularly when by the cuſtom of the manor the right to the trees, when cut, is in both. The caſe of lord and tenant is not like that of tenant for life and remainder-man. Their rights are upon the ſame ground; and the reverſioner enters for the forfeiture: but the lord muſt have it preſented by the homage. 4 *Veſ. jun.* 706. 1799. *Deuch* v. *Bampton.*

(D) Diſputes between Tenant for Life and Remainder-man, or Reverſioner in Fee. 20 Vin. 417.

1. *A.* Tenant for life, remainder to *B.* in tail, as to one moiety, remainder to *C.* an infant in tail, as to the other moiety, remainder over. There is timber on the premiſes greatly decaying; *B.*, the remainder-man, brings a bill, praying that the decaying timber may be cut down, ſold, and the money divided between him and the infant; the tenant for life ordered to have ſufficient left for repairs, and an allowance for damage done to him on the ground; but not to be conſidered for the timber, which, when ſevered by any means whatſoever, belongs to the firſt owner of the inheritance; decaying timber not to be cut down, if for ornament or ſhelter; alſo where an infant is concerned in the inheritance, no timber to be cut down without the approbation of the maſter, and the infant's money to be put out for his benefit. 3 *P. Wms.* 267. 1734. *Bewick* v. *Whitfield.*

2. A rector may cut down timber for the repairs of the parſonage-houſe or chancel, but not for any common purpoſe. 2 *Atk.* 217. 1741. *Strachy* v. *Franeis.*

3. A rector is entitled to botes for repairing barns and outhouſes belonging to the parſonage. *Ibid.*

4. The reaſon why the common law gave ſo large a power to tenant for life, *without* impeachment of waſte, was for the intereſt of the public, that timber might thereby circulate for ſhipping and other uſes. 3 *Atk.* 216. 1744. *Anon.*

5. The firſt owner of the inheritance ſhall have timber trees blown down. 3 *Atk.* 755. 1753. *Garth* v. *Cotton.*

6. Where lands are exchanged under acts of incloſure, tenant for life impeachable for waſte, cannot cut timber for the incloſure, but muſt raiſe money under the powers in the act. 1 *Bro. Cha. Rep.* 194. 1783. *Lee* v. *Alſton.*

7. Bill by an infant, tenant in tail in reverſion, to have timber cut; the timber was ordered to be felled and the claims to be diſcuſſed when the tenant in tail came of age, and in the meantime the money to be inveſted in the funds. 4 *Bro. Cha. Rep.* 76. 1792. *Mildmay* v. *Mildmay.*

8. Timber on the eſtate of a lunatic was cut down under an order of court, ſold, and the produce paid into the bank on account of the lunatic; after his death, on petition by his heir for the money, the Lord Chancellor was of opinion, that the court might do it for the lunatic's benefit, but only on preſſing occaſions; that when property is converted, equity will recall it for the repreſentative, if done by breach of truſt, not if by accident, the court, or the tort of a ſtranger. 1 *Veſ. jun.* 453. 1792. *Ex parte Bromfield.*

9. Tenant for life has no property in the underwood, till his eſtate comes into poſſeſſion, therefore cannot have an account of what

what was cut wrongfully by a preceding tenant. 1 *Ves. jun.* 479. 1792. *Pigot* v. *Bullock.*

10. Tenant for life without impeachment of waſte cannot maintain trover for timber ſevered during a prior eſtate, but it veſts immediately in the owner of the inheritance; tenant for life impeachable is in the ſame caſe as to underwood. 1 *Ves. jun.* 484. *Ibid.*

11. Tenant for life liable to waſte having ſold timber, cannot prevent the vendee from cutting it. 3 *Ves. jun.* 3. 1795. *Wentworth* v. *Turner.*

[G]

Treſpaſs.

20 Vin. 421.

(A. 2) Aſſault, What. (And Menace.)

1. WHERE the defendant threw a lighted ſquib into the market-place, which being toſſed from hand to hand, by *different perſons*, at laſt put out the plaintiff's eye; treſpaſs and aſſault lies. *Scott* v. *Shepherd*, 3 *Wilſ.* 403.

2. If a perſon puſhes a drunken man againſt another and hurt him, this is actionable as an aſſault and battery. But if the defendant intended to do a right act, as to aſſiſt him along the ſtreet, and in ſo doing an injury is done, he will not be anſwerable. *Short* v. *Lovejoy, coram Lee*, C. J. 1752. *Bull. N. P.* 16.

20 Vin. 424.

(C) Treſpaſs of Aſſault and Battery. What will be a good Cauſe of Juſtification.

1. NO man ſhall be excuſed a treſpaſs unleſs it be juſtified entirely without his default, and therefore it has been holden, that an action lay where the plaintiff ſtanding by to ſee the defendant uncock his gun, was accidentally wounded. *Underwood* v. *Hewſon, Stra.* 596. *Bull. N. P.* 16.

This caſe does not ſeem very well to accord with the true principles of the law of aſſaults. To conſtitute an aſſault, the injury ſhould be *wilful* or, *proceed from want of proper caution.* In the caſe of Weaver and Ward, Hob. 134., from which this ſeems not much to differ, the defendant pleaded that he was a trained ſoldier, and that he and the plaintiff were under one captain, and in muſtering he diſcharged his gun, which *caſualiter, et per infortunium, et contra voluntatem ſuam*, did hurt the plaintiff; and it was there held, that if the defendant had pleaded that he could not have avoided it, or that the plaintiff had run acroſs the gun when it was diſcharging, or had ſet forth the circumſtances, ſo that it might appear to the court to be inevitable, that ſuch a plea had been a ſufficient juſtification. In the principal caſe the act was in itſelf lawful, and the default was not wilful; and there ſeems no reaſon why the defendant might not, under theſe circumſtances, plead the general iſſue, and give this juſtification in evidence.

2. If an *officer* has a writ or warrant againſt a perſon who will not ſuffer himſelf to be arreſted, he may juſtify a beating or even wounding in the attempt to arreſt him. *Hawk. P. C.* 130.

3. No man can juſtify an aſſault by ſaying *molliter inſultum fecit* in defence of his poſſeſſions, but he may ſay *molliter manus impoſuit*. And a wife may juſtify an aſſault in defence of her huſband, but not *e contrà*, becauſe the maſter might have action *per quod ſervitium amiſit*. 1 *Raym. Rep.* 62. *Seward et ux.* v. *Barcly*.

4. If the defendant proves that the plaintiff firſt lifted up his hand to ſtrike him, and *offered ſo to do*, it is a ſufficient aſſault to juſtify his ſtriking the plaintiff; for he need not ſtay till the plaintiff has actually ſtruck him, for he might be diſabled by the blow. *Bull. N. P.* 18.

5. A plea of *molliter manus impoſuit*, in order to turn the plaintiff out of the defendant's houſe, where ſhe continued againſt his will, is no anſwer to a charge againſt the defendant for ſtriking the plaintiff repeated blows, and with great force and violence ſeveral times knocking her down. *Gregory & ux.* v. *Hill*, 8 *Term Rep.* 299.

(G. 4) Aſſault and Battery. Declaration. Good or not.

20 Vin. 431.

1. THE declaration in aſſault and battery cannot lay the offence on *a day certain*, and at *divers other days and times*; for an aſſault is one individual act, a diſtinct offence, and cannot be laid with a *continuando*. *Michell* v. *Neal & ux.* 2 *Cowp.* 828.

2. In aſſault, it was once well laid, but then went on with a *cumque etiam*, and laid another aſſault; there were entire damages, and it was moved in arreſt of judgment, that the laſt aſſault was not poſitively charged, but only by way of recital; and the judgment was arreſted. *Amyon* v. *Shore*, 1 *Stra.* 621. In this caſe the proceedings were by bill in *K. B.* If they had been by original, the declaration would have been made good by the recital of the original writ. *Vide White* v. *Shaw*, 2 *Wilſ.* 203. For in the court of *Common Pleas* the writ being ſet out in the declaration helps the want of a poſitive averment. But if the declaration is ſo in *K. B.* the defendant ſhould take advantage of it by ſpecial demurrer, for it will be good after a verdict. *Douglas* v. *Hale*, 1 *Wilſ.* 99.

3. For a battery of the wife the huſband and wife ſhould join in the action, and the damages be laid *ad damnum ipſorum*, Firſt, Becauſe the huſband is damnified by being put to expence for her cure, and in ſuing the action. Secondly, Becauſe the action and damages ſurvive to the wife, to whom the injury had been committed. *Newton* v. *Hatter*, 2 *Ld. Raym.* 1208. If the aſſault and battery have been committed againſt *both huſband and wife*, he muſt bring his action alone for the injury done to *himſelf*; for the wife cannot join in an action for an injury done to the *huſband*.

20 Vin. 432.

(G. 5) Pleadings. Good or not.

1. WHERE in aſſault, battery, and falſe *impriſonment*, the defendant *juſtified the impriſonment* under proceſs of an inferior court, but ſaid nothing more than a general traverſe to the aſſault and battery, the plaintiff had judgment; for it was not ſufficient to juſtify the impriſonment alone, though it includes a battery; for the defendant ſhould have pleaded to the aſſault and battery, by ſhewing reſiſtance made to the arreſt. *Truſcott* v. *Carpenter*, 1 *Ld. Raym.* 229.

2. In an action againſt a ſervant, if he pleads a juſtification in defence of his maſter, he muſt plead it thus, "That the plaintiff would have ſtruck his maſter if he had not interpoſed, and ſtruck the plaintiff *prout ei bene licuit*;" for the ſervant can only ſtrike to *prevent an injury*, not by way of revenge; and therefore where the ſervant pleaded, "That the plaintiff, having ſtruck his maſter in his preſence, that he in his maſter's defence ſtruck the plaintiff," the plea was held to be ill on demurrer, for the aſſault on the maſter might be over when the ſervant ſtruck him. *Borfoot* v. *Reynolds*, 2 *Stra.* 953.

3. If the defendant juſtifies an aſſault and battery under a writ to the ſheriff, and warrant directed to him to arreſt the plaintiff, he ſhould ſet out from what court the writ iſſued, or it will be bad. *Gray* v. *Hart*, 2 *Salk.* 517. Here he juſtified under a writ returnable in *C. B.*, and it was held ill; for it might be a writ out of the *K. B.* or *county palatine*, which cannot be returnable in the Common Pleas.

4. By ſtatute 21 *Jac.* 1. *c.* 16. "All actions of aſſault and battery muſt be ſued within *four years*," and this ſtatute muſt be pleaded in bar.

5. The defendant cannot plead double under the ſtatute, the general iſſue *not guilty* and a juſtification; for they are contradictory, ſince a juſtification muſt admit what the general iſſue denies. *Palmer* v. *Wadbrook*, 2 *Stra.* 876.

6. In juſtifying the uſe of a crane in a public quay, it is ſufficient to ſay that "it is a public and open lawful quay," without claiming the right by immemorial uſage. *Bolt* v. *Stennett*, 8 *Term Rep.* 606.

7. To treſpaſs for an aſſault and battery, the defendant may plead that the plaintiff with force and arms, and with a ſtrong hand, endeavoured forcibly to break and enter the plaintiff's cloſe, whereby the defendant "did then and there reſiſt and "oppoſe ſuch entrance, and did then and there defend his poſſeſ-"ſion, as it was lawful for him to do;" and if any damage happened to plaintiff, it was in the defence of the poſſeſſion of the ſaid cloſe. *Weaver* v. *Buſh*, 8 *Term Rep.* 78.

8. If the plaintiff ſue out a general writ of treſpaſs *quare clauſum fregit*, he may declare either *generally*, or *name the place* where the treſpaſs

paſs was done. If he *name the place in the writ*, and declare on it, the defendant cannot vary the place; but if the writ is general, and the plaintiff declares generally, or names the place in his declaration, yet may the defendant vary the place, and put the defendant to his new aſſignment. *Martin* v. *Keſterton*, 2 *Bl. Rep.* 1089. in *C. B.*

9. As where the plaintiff declares on a treſpaſs in ſuch a vill, the defendant may reply *liberum tenementum*; and if he prove any part of the vill to be his freehold, he muſt have judgment; the plaintiff is therefore driven to his new aſſignment: but Mr. Juſtice *Buller* in this caſe was of opinion, that pleading generally *liberum tenementum* would be bad, and that the defendant ſhould give a certain name to his freehold: for if the plaintiff ſhould alſo have a freehold in the ſame vill, he may prove the treſpaſs there and have judgment. *Buller's N. P.* 92.

10. A juſtification, by bail above, for breaking and entering the houſe of *A.*, the outer door being open, in which the principal reſides, in order to ſeek for him for the purpoſe of rendering him, is good, without averring that the principal was in the houſe at the time. *Sheers* v. *Brooks*, 2 *H. Bl.* 120.

11. And in ſuch a plea an averment that the defendants "duly "became bail and entered into a recognizance," is ſufficient; without ſtating that the principal was delivered into their cuſtody. *Ibid.*

12. A plea of juſtification by an officer (to treſpaſs for taking the goods of *A. B.*) that he took them under a *diſtringas* againſt *C. B.* (meaning the ſaid *A. B.*) to compel an appearance, cannot be ſupported; though it be averred that *A. B.* and *C. B.* are the ſame perſon; unleſs *A. B.* appeared in that action, and omitted to plead the miſnomer in abatement. If he did appear in that action, and omitted to plead it in abatement, he is concluded by it. *Cole* v. *Hudſon*, 6 *Term Rep.* 234.

13. Where the treſpaſs was for breaking and entering the plaintiff's houſe, and throwing about and ſpoiling *his goods*, it was objected on demurrer that the ſeveral goods in the declaration mentioned generally ought to have been ſet out; but it was over-ruled; for the ſpoiling of the goods was only laid in aggravation of the treſpaſs, and was not itſelf the cauſe of action, and ſo need not be ſet out in the declaration. *Chamberlain* v. *Greenfield*, 3 *Wilſ.* 292.

14. When the plaintiff declares in treſpaſs on his poſſeſſion, and the defendant makes title and gives colour to the plaintiff, the plaintiff's replication which traverſes the defendant's title without ſetting up any title in himſelf, but merely concluding with *de injuria ſua propria, &c.* is good: for treſpaſs is a poſſeſſory action, which poſſeſſion is here admitted in giving colour; and the replication lays the defendant's title out of the caſe, and then it ſtands on the plaintiff's poſſeſſion, which is ſufficient againſt a wrong-doer. *Cary* v. *Holt*, 2 *Stra.* 1238. *Bull. N. P.* 93.

15. In treſpaſs for breaking and entering the plaintiff's houſe, and expelling him therefrom, the breaking and entering are the giſt of the action, and the expulſion is merely aggravation, therefore a juſtification as to the breaking and entering will cover the whole declaration. *Taylor* v. *Cole*, 3 *Term Rep.* 292.

16. If the plaintiff mean to inſiſt on the expulſion, as making the defendant a treſpaſſer *ab initio*, he ſhould new aſſign. *Ibid.* Affirmed in *Cam. Scac.* 1 *H. Bl.* 555.

17. The ſecond count in treſpaſs (being a general one) does not always avoid the neceſſity of a new aſſignment: it is added in order to avoid the locality. But there cannot be a new aſſignment except where there is a general plea; and if the caſe be ſuch that on a ſpecial plea the plaintiff may be driven to a new aſſignment, he may give the matter in evidence under the ſecond count on not guilty. *Smith* v. *Miller*, 1 *Term Rep.* 479.

18. If to an action of treſpaſs for pulling down and carrying away a gate, the defendant plead a right of way, and the gate being wrongfully erected acroſs the ſame, he took it down, and depoſited it in a convenient place for *the uſe of the plaintiff*; to which the plaintiff replies a ſubſequent converſion: proof that the defendant put the gate upon his own premiſes, from whence the plaintiff might have taken it if he had pleaſed, will not ſuſtain the replication. *Houghton* v. *Butler*, 4 *Term Rep.* 364.

19. Under an *alia enormia* in treſpaſs, no facts can be given in evidence which might, conſiſtent with decency, be ſtated on the record. *Lowden* v. *Goodrick*, *Peake's N. P.* 46.

20. Therefore on a declaration for falſe impriſonment, the plaintiff cannot give in evidence that he was ſtinted in his allowance of food, unleſs it is ſpecially ſtated in the declaration. *Ibid.*

21. Or that being confined in a common priſon, ſhe caught the gaol fever, unleſs it is ſpecially laid as a conſequence of the impriſonment. *Pettit* v. *Addington*, *ibid.* 62.

22. When the plaintiff is in the *actual* poſſeſſion of the cloſe, the defendant in an action of treſpaſs cannot give evidence of property in a ſtranger under the *general iſſue*. *Philpot* v. *Holmes*, *ibid.* 67.

23. If *A.* be in poſſeſſion of *part of a houſe*, and *B.* of the reſidue, and an officer enters into *A.*'s part under a writ againſt *B.*'s goods, which are not there, *A.* may maintain treſpaſs againſt the officer for breaking and entering his *houſe*, and need not make any new aſſignment to a juſtification under the writ againſt *B.* *Fallon* v. *Anderſon*, *ibid.* 110.

24. In treſpaſs for taking the plaintiff's hog, and converting the ſame to the defendant's uſe; the *converſion* is only matter of aggravation, and need not be juſtified or anſwered, for the converſion is not a treſpaſs *vi et armis*. *Goodtitle* v. *Toombs*, *C. B.* 3 *Wilſ.* 118.

25. One was arreſted by a *capias ad reſpondendum*, teſted in *Trinity* and returnable in *Hilary* term following; the writ was ſet

ſet aſide as void. Treſpaſs for falſe impriſonment lies againſt the plaintiff in that writ, and he cannot juſtify under a void or irregular writ. 3 *Wilſ.* 341. *Parſons* v. *Lloyd*, *C. B.*

26. *Treſpaſs* for ſtopping the waggon of the plaintiff, and ſeizing and taking from the cattle drawing the ſame a pair of iron geers: the defendant *preſcribes* for *toll through* the ſtreets of *Gainſborough*, in conſideration of repairing divers ſtreets *there*, and to diſtrain for the ſame: the plaintiff replies *de injuria ſua propria*, and traverſes the preſcription. Verdict for the defendant. In arreſt of judgment the preſcription was adjudged ill, becauſe it doth not ſay that he repaired *all the ſtreets there*, and the plaintiff might be paſſing with his waggon through a ſtreet, which he did not repair. *Trueman* v. *Walgham* and *Key*, *C. B.* 2 *Wilſ.* 296.

27. *Treſpaſs* for impounding the plaintiff's mare. The defendants *plead damage feaſant* to the King in his foreſt of *Waltham*: the plaintiff *replies*, and ſhews his right of common in the place in which, *&c.*: the defendants *rejoin*, that the mare was mangy and doing damage, and therefore they took and impounded her, becauſe ſhe was wrongfully and unlawfully in the *foreſt*: the plaintiff *ſur-rejoins*, and traverſes that the plaintiff was wrongfully and unlawfully in the *foreſt*: the defendants take iſſue on the *traverſe*, *demurrer*, and *joinder*: the defendants *rejoinder* is a *departure* from their plea. *Palmer* v. *Stone*, 2 *Wilſ.* 96.

28. A battery cannot be juſtified by *molliter manus* on an arreſt only, but defendant muſt ſhew reſiſtance or an attempt to reſcue. *Williams* v. *Jones*, 2 *Stra.* 1049.

29. A defendant may juſtify a battery by pleading *molliter manus*, *&c.* in order to arreſt, *&c.* *Rowe* v. *Tutte*, *Willes*, 14. *Titley* v. *Foxall*, *ibid.* 688.

30. To treſpaſs, aſſault, and falſe impriſonment, three defendants made a joint plea of juſtification under proceſs, *&c.* in which one ſaid, that he, as attorney for the party ſuing out that proceſs, delivered the warrant to the other two defendants, (to whom it was directed) to be executed, *&c.*, and the two others, that they executed, *&c.*, and it was holden a good plea, *Ibid.*

31. A plea of *molliter manus impoſuit*, in order to turn the plaintiff out of the defendant's houſe, where ſhe continued againſt his will, is no anſwer to a charge againſt the defendant for ſtriking the plaintiff repeated blows, and with great force and violence ſeveral times knocking her down. *Gregory* v. *Hill*, 8 *Term Rep.* 299.

(X) What Act ſhall be ſaid to be a Treſpaſs.

20 Vin 466.

1. *A.* Having let his houſe ready furniſhed to *B.* cannot maintain treſpaſs againſt the ſheriff for taking the furniture under an execution againſt *B.*, though notice were given that the goods belonged to *A.*; becauſe treſpaſs is founded on a tort done

to the poſſeſſion, which was not in *A.* at the time. *Ward* v. *Macauley*, 4 *Term Rep.* 489.

2. Where the plaintiff brought treſpaſs for breaking and entering his houſe, and *taking an exceſſive diſtreſs*, it was adjudged that this action would not lie: for the taking was lawful, and no ſubſequent abuſe appeared to make the defendant a treſpaſſer *ab initio*. *Lynne* v. *Moody*, 2 *Stra.* 851. But *Vide* 1 *Burr.* 579. *Hutchins* v. *Chambers*.

3. A ſheriff or his officers ſhall not be treſpaſſers by relation, if the firſt taking were lawful. 1 *Term Rep.* 480.

4. Treſpaſs lies againſt the ſearchers of leather appointed by ſtat. 2 *Jac.* 1. *c.* 22. for ſeizing leather ſufficiently dried, in order to carry it before other officers called triers, although in their judgment it is inſufficiently dried. *Warne* v. *Varley*, 6 *Term Rep.* 443.

5. Where a juſtice of the peace maliciouſly grants a warrant againſt another, without any information laid before him, upon a ſuppoſed charge of *felony*, the remedy againſt the juſtice is *treſpaſs*, and not caſe. *Morgan* v. *Hughes*, 2 *Term Rep.* 225.

6. A father may maintain treſpaſs for breaking, &c. his houſe and debauching his daughter, *per quod ſervitium amiſit*, though the daughter be above 21 years of age, where acts of ſervice are proved, though there be no contract for ſervice. *Bennett* v. *Allcot*, 2 *Term Rep.* 166.

7. Treſpaſs will not lie in this country for entering a houſe in *Canada*, becauſe the cauſe of action is local. *Doulſon* v. *Matthews*, 4 *Term Rep.* 503.

8. *Treſpaſs* lies, and not caſe, for working an eſtray, although the original taking be admitted to be lawful. *Oxley* v. *Watts*, 1 *Term Rep.* 12.

9. A perſon may juſtify a treſpaſs in following a fox with hounds over the grounds of another, if he does no more than is neceſſary to kill the fox, becauſe they are noiſome animals. *Gundry* v. *Feltham*, 1 *Term Rep.* 334.

10. If a lord of a manor cut down trees where a copyholder may take them for repairs, treſpaſs lies. *Aſhmead* v. *Ranger*, 1 *Com. Rep.* 71.

11. Treſpaſs lies for the owner of the ſoil, againſt one for placing a ſtall in the market, without his licenſe. *The Mayor, &c. of Northampton* v. *Ward*, 1 *Wilſ.* 107.

12. If a man turns his cattle into *Blackacre*, where he has no right, and they eſcape and ſtray into my cloſe for want of fences, he cannot excuſe himſelf, or juſtify his cattle treſpaſſing on my cloſe. *Anon.* 3 *Wilſ.* 126.

13. If the act, in the firſt inſtance, be unlawful, *treſpaſs* will lie; but if the act is *prima facie* lawful, and the prejudice to another is not *immediate*, but *conſequential*, it muſt be an action upon the caſe; and this is the diſtinction. *Gates* v. *Bailey*, 2 *Wilſ.* 313. 1 *Stra.* 635.

14. Treſpaſs *vi et armis* lies againſt a defendant for driving his cart ſo furiouſly that it was driven with great force againſt the plaintiff's carriage, and overturned and damaged it. *Day* v. *Edwards*, 5 *Term Rep.* 648.

15. An action on the *caſe*, and *not* an action of treſpaſs, is the proper remedy for an injury done to the plaintiff's carriage by the ſervant of the defendant's negligently driving his maſter's carriage againſt it. *Morley* v. *Gaysford*, 2 *H. Black.* 442.

16. If *A. wilfully* run his veſſel againſt *B.*'s, and damage enſue, *B.* may bring *treſpaſs*; but if *A.* ſo *negligently* ſteer his veſſel that it runs foul of *B.*'s then caſe is the proper action. *Ogle* v. *Barnes*, 8 *Term Rep.* 188.

17. Where a juſtice of peace maliciouſly grants a warrant againſt another without any information, upon a ſuppoſed charge of felony, treſpaſs lies againſt him. *Morgan* v. *Hughes*, 2 *Term Rep.* 225. And this is the only remedy. *Ibid.*

(F. a. 2) Treſpaſs. Juſtifiable. In what Caſes. By Officers.

20 Vin. 492.

1. THE rule as to juſtification under proceſs of any court is, that if the court has juriſdiction, but their proceedings are irregular, treſpaſs lies againſt the plaintiff in the action for taking the goods, but not againſt the officer; but if the court has not juriſdiction the officer is liable. 2 *Wilſ.* 384.

2. Where the goods of a trader were taken in execution after an act of bankruptcy committed by the defendant, who was ſheriff, but before the ſale the commiſſion was ſued out, and a proviſional aſſignment made, of which he had notice, but notwithſtanding he ſold the goods; *this action* was held not to lie, though *trover* might, for the *taking* was rightful and legal, and the converſion only unlawful, he having had notice that the property was changed. *Smith* v. *Miller*, 1 *Term Rep.* 475.

3. Though poſſeſſion be regularly taken of goods, yet the officer muſt remove them to a place of ſafe cuſtody in a proper time; for where he kept poſſeſſion of them on the premiſes, under an attachment from an inferior court, for an unreaſonable length of time, *viz.* ſix months, he was held to be a treſpaſſer *ab initio*. *Read* v. *Harriſon*, 2 *Black. Rep.* 1218.

4. In treſpaſs for breaking and entering the plaintiff's cloſe and taking his goods, the defendant may juſtify under a ſufficient legal proceſs if he had it in fact at the time, though he declared then that he entered for another cauſe. *Crowther* v. *Ramſbottom*, 7 *T. Rep.* 654.

5. In an action for breaking andentering the plaintiff's houſe, a ſheriff's officer cannot juſtify having entered under a writ of *quare clauſum fregit*, and continuing till he received a ſum of money as and by way of ſurety for the plaintiff's appearance under that

writ. *More* v. *Beaumont*, 6 *Term Rep.* 137. *Qu.* Can he juſtify attaching the defendant's property under ſuch a writ? *Ibid.*

6. Treſpaſs does not lie againſt exciſe officers who enter into a perſon's houſe by virtue of a legal warrant to ſearch for ſmuggled goods, although none ſuch be found therein. But caſe lies for maliciouſly obtaining or executing the warrant. *Cooper and another* v. *Boot in error*, 1 *Term Rep.* 535. (*n.*)

7. A conſtable is not juſtified in taking a perſon into cuſtody for a mere aſſault, unleſs he is preſent at the time the aſſault is committed, and interpoſes with a view to prevent a breach of the peace; but if an affray has happened, and a wound has been given, which there is reaſonable ground to ſuppoſe may end in a felony, a party may take the party who has given ſuch wound into cuſtody without a warrant. 2 *Eſp. Rep.* 540.

8. A conſtable acting *colore officii* is not protected by ſtat. 24 *G.* 2. *c.* 44, where the act committed is ſuch as his office gives him no authority to do. *Ibid.*

9. An officer of an inferior court may juſtify acting under proceſs which is only *voidable*, but not under *void* proceſs. *Willes*, 122. But though an officer is juſtified in acting under erroneous proceſs, it muſt be in a caſe where the court out of which it iſſued, had juriſdiction. *Ibid.*

10. Treſpaſs will not lie againſt the ſheriff or his officer for arreſting a certificated bankrupt, a peer, a diſcharged inſolvent, *&c.* *Dougl.* 671.

30 Vin. 497.

(F. a. 4) Juſtification by Officers. *Pleadings.*

1. TRESPASS for impounding cattle, and keeping them ſo cloſe that one died. Juſtification for damage feaſant; the dying of the beaſt is only gravamen, and need not be anſwered in treſpaſs. *Gales* v. *Bayley*, *C. B.* 2 *Wilſ.* 313.

2. Where the officer joins in defence with one for whom the warrant is no juſtification, he forfeits the benefit of it. 1 *Stra.* 509.

3. Where the party and the officer join in a juſtification, which is ill as to one of them, judgment ſhall be againſt both. Juſtification under proceſs muſt ſhew it was returned. *Middleton* v. *Price*, 1 *Wilſ.* 17.

4. But a bailiff or other ſubordinate officer need not ſhew that the writ was returned, becauſe it is not in his power, as he is only to execute the ſheriff's warrant. *Bul. N. P.* 23.

5. In treſpaſs for taking away goods, the defendant pleaded tender of amends, and on demurrer judgment was given for the plaintiff. *Bailee* v. *Vivaſh*, 1 *Stra.* 549.

6. A defendant in an action for falſe impriſonment, pleading a juſtification under meſne proceſs, ſued out by him in a cauſe in which he was plaintiff, may ſtate that the writ iſſued upon an affidavit to hold to bail, without ſetting forth the cauſe of action. *Bilk* v. *Broadbent*, 3 *Term Rep.* 183.

7. Defendant

7. Defendant juſtified as an officer of an inferior court for trying, &c. cauſes touching mines and miners within a certain diſtrict; the plea was holden bad, becauſe it did not allege that the defendant below was a miner, "at the commencement of the ſuit below;" but only "when the execution iſſued." *Willes*, 122.

8. If the Plaintiff, in an action in an inferior court, or a mere ſtranger, juſtify under proceſs, he muſt ſet forth the proceedings at length, otherwiſe the plea is bad, not only as it reſpects him, but the officers of the court alſo who join with him in the plea. *Ibid.*

9. A principal officer, to whom returnable proceſs is directed, muſt ſhew that it is returned, but a ſubordinate officer need not. *Moravia* v. *Sloper*, *Willes*, 30. *Morſe* v. *James*, *Ib.* 122.

10. In treſpaſs for taking goods, if defendant juſtifies for that *according to cuſtom* of city, he levied a plaint, &c. it is good; though he does not ſay the court was held according to cuſtom, though it is of horſes or geldings, though he does not aver they were taken within the juriſdiction (if it appears they were), though he mention only one ſheriff of *London*. *Williams* v. *Jones*, 1 *Burr.* 298.

11. In treſpaſs for breaking and entering the plaintiff's cloſe and taking his goods, though defendant may juſtify under a ſufficient legal proceſs, if he had it in fact at the time, although he declared then that he entered for another cauſe. *Crowther* v. *Ramſbottom*, 7 *Term Rep.* 654.

12. If defendant juſtify under a *capias* out of a baſe court, in action of debt, and ſhews that a plaint was levied, *et taliter proceſſum fuit*, that a *capias* iſſued; it is well, without ſhewing that a ſummons iſſued before the *capias*. *Adams* v. *Freeman*, 2 *Wilſ.* 5.

13. A warrant to arreſt the party, "to the end that he may become bound, &c. to appear at the *next ſeſſions*, &c." means the next ſeſſion after the arreſt, and not after the date of the warrant; an officer therefore executing it may juſtify an arreſt after the ſeſſions next enſuing the date of the warrant. *Mayhew* v. *Parker*, 8 *Term Rep.* 110.

14. If a warrant on a *capias* has two bailiffs' names inſerted by the *under ſheriff*, and a blank left for a third, is ſealed and ſent to Plaintiff's attorney, who inſerts another bailiff's name in the blank, it is a bad warrant, and no juſtification of the third bailiff who arreſts. *Burſlem* v. *Fern*, 2 *Wilſ.* 47.

15. A plea of juſtification by an officer (to treſpaſs for taking the goods of *A. B.*), that he took them under a *diſtringas* againſt *C. B.* (meaning the ſaid *A. B.*) to compel an appearance, with an averment that *A. B.* and *C. B.*, as the ſame perſon, cannot be ſupported unleſs *A. B.* appeared in that action and did not plead the *miſnomer* in abatement, *Cole* v. *Hindſon*, 6 *Term Rep.* 234.

16. If he had appeared in that action, and had omitted to plead it in abatement, he would have been concluded by it. *Ibid.* *Crawford* v. *Satchwell*, 2 *Stra.* 1218.

17. Where defendant juſtifies (in treſpaſs for taking the Plaintiff's goods, and converting them, *&c.*) taking them as a diſtreſs for rent, the taking and converting are conſidered the ſame thing; and therefore it is not inconſiſtent to plead a juſtification to the taking and converting all the goods as a diſtreſs, and afterwards to ſay that he left part of them in the plaintiff's poſſeſſion. *Cooper* v. *Monke*, *Willes*, 52.

20 Vin. 499. (G. a) Treſpaſs *ab Initio*. What Act ſhall make a Man (Officer or Other) Treſpaſſer *ab Initio*.

1. IN an action of treſpaſs for taking a horſe, the defendant, as bailiff to the lord of the manor of *A.*, juſtified taking it as an eſtray. Replication, that after the taking mentioned in the declaration, the defendant worked the ſaid horſe, and ſo became a treſpaſſer *ab initio*. It was moved to ſet aſide the verdict which had been obtained by the plaintiff, on the ground that this ſhould have been *an action on the caſe* for the conſequential damage, and not an action of *treſpaſs*, becauſe the original taking was admitted to be lawful. But *per Curiam*, the ſubſequent uſing is an aggravation of the treſpaſs in taking the horſe; for the uſing made him a treſpaſſer *ab initio*. *Oxley* v. *Watts*, 1 *Term Rep.* 12.

2. But where the plaintiff brought treſpaſs for breaking and entering his houſe, and *taking an exceſſive diſtreſs*, it was adjudged that this action would not lie; for the taking was lawful, and no ſubſequent abuſe appeared to make the defendant a treſpaſſer *ab initio*. *Lynne* v. *Moody*, 2 *Stra.* 851.

3. As the moſt frequent caſes which occurred under this head, happened where the original taking was lawful, but by ſome ſubſequent irregularity the party made himſelf a treſpaſſer *ab initio*; this hardſhip was remedied by ſtat 11 *G.* 2. *c.* 19. which enacts, "That a diſtreſs for rent ſhall not be deemed unlawful, nor the "party be deemed a treſpaſſer *ab initio* for any irregularity in the "ſubſequent diſpoſition of it; but that the party aggrieved "might recover full ſatisfaction for the ſpecial damage he ſhall "have ſuſtained thereby, and no more, in an action of treſpaſs, "or on the caſe, unleſs tender of amends has been made before." See alſo 17 *G.* 2. *c.* 38.

4. Since the above ſtatute, trover will not lie for goods taken under an irregular diſtreſs, as tending to place the landlord in the ſame ſituation he was in before the paſſing of the ſtatute by conſidering him a treſpaſſer *ab initio*. *Wallace* v. *King*, 2 *H. Bl.* 13.

(U. a. 4) Pleadings. Where there is a new Aſſignment. 20 Vin. 546.

IF a declaration againſt *A.* and *B.* for falſe impriſonment contain two counts, to both of which the defendants plead not guilty, and juſtify the firſt under *meſne* proceſs, *A.*, as the Plaintiff in that action, and *B.*, as the bailiff; and the plaintiff, by new aſſignment, admitting the arreſt to be lawful, reply that *B.*, with the conſent of *A.*, voluntarily releaſed him, and that they afterwards impriſoned him for the time mentioned in the firſt count: the plaintiff, having failed in proving the new aſſignment by not ſhewing the conſent of *A.*, ſhall not be permitted to prove the ſame treſpaſs againſt *B.* under the other count. *Semb.* 2 *Term Rep.* 172.

Truſt.

(A) What it is, and Rules relating to Truſts. 21 Vin. 493.

1. THE ſtatute of limitations does not run upon a truſt. *Com. Rep.* 709. *Mich.* 13 *G.* 2. *Skrime* v. *Meyrick.*

2. Whenever a truſtee becomes incapable of performing his duty, it is the office of a court of equity to interpoſe and guide him, whether his incapacity proceeds from weakneſs or corruption; and there is no inſtance where the court is bound in conſcience to ſet aſide the act of a truſtee, in which it has not alſo decreed the proper act to be done, not by referring the matter to his diſcretion, which is forfeited, but by directing him, as a mere inſtrument, to perform the thing decreed. 5 *Bro. P. C.* 411. 1760. *Richardſon* v. *Chapman and others.*

3. Upon a truſt in equity, no eſtate can be gained by wrong, as there might of a legal eſtate; therefore, on a truſt in equity, no eſtate can be gained by diſſeiſin, abatement, or intruſion. 1 *Atk.* 391. 1738. *Hopkins* v. *Hopkins.*

4. There are no mergers of truſts in equity. *Ibid.*

5. Uſes executed and mere truſts ſtand upon different foundations, and are not governed by the ſame reaſoning. *Ibid.*

6. A truſt is where there is ſuch a confidence between the parties, that no action will lie, but is a caſe merely for the conſideration of equity. 2 *Atk.* 612. *July* 1744. *Sturt* v. *Melliſh.*

7. From the time of the agreement for the purchaſe of an eſtate, the vendee is a truſtee as to the money for the vendor; but

but this rule is confined merely to the vendor and vendee, and will not extend to a third perſon. 3 *Atk.* 273. *Feb.* 1745. *Pollexfen* v. *Moore.*

8. Legacies to charities, with directions that the qualifications of the perſons and the charities ſhould be at the diſcretion and choice of his executors, being duly weighed and conſidered, held a truſt, and to go to the ſurviving executors. *Ambl.* 584. *Oct.* 1738. *Attorney-General* v. *Glegg.*

21 Vin 494.

(B) Amounts to it. What.

1. *A.* As guardian of *B.* an infant, made a claim to certain lands, before the truſtees of the *Iriſh* forfeitures, which being allowed, he entered on the lands, part of theſe lands being out upon leaſe; *A.* procured a derivative leaſe thereof to himſelf; but it was held to be in truſt for the infant. 1 *Bro. P. C.* 171. 1706. *Anneſley* v. *Dixon.*

2. *A.* by marriage articles covenanted, that all the lands, which he ſhould afterwards purchaſe in the pariſh of *M.*, ſhould be to the uſes of the articles. He purchaſed lands in *M.*, and took a conveyance in fee, in the name of his youngeſt ſon, but there was no declaration of truſt. Held, that the ſon was a truſtee for his eldeſt brother, who was entitled to theſe lands by virtue of the covenant. 2 *Bro. P. C.* 350. 1721. *Blake* v. *Blake.*

3. *A.* purchaſes an eſtate in the name of *B.*, and ſuffers him for many years to act as the owner of it, by receiving the rents, *&c.* but no declaration of truſt was ever executed by *B.* After both their deaths, the heir at law of *A.* inſiſts that *B.* was only a truſtee as to this eſtate for *A.* and therefore demands a conveyance, and an account of rents and profits, and files a bill for that purpoſe. Bill diſmiſſed with coſts. 4 *Bro. P. C.* 258. 1736. *Delane* v. *Delane.*

4. *A.*, being in poſſeſſion of lands for a long term of years, contracts for the purchaſe of the reverſion and inheritance, but, to prevent a merger of the term, takes the conveyance to *B.* abſolutely, and without requiring any declaration of truſt. The title deeds were all along in the cuſtody of *A.* and thoſe claiming under him; but a deſcendant of *B.*, having by accident diſcovered that the conveyance was made abſolutely to him, lays claim to this eſtate as his heir at law. Held that, under the circumſtances, *B.* was a truſtee for *A.* 4 *Bro. P. C.* 337. 1737. *Lewes* v. *Andrews.*

5. All truſts, by operation of law, are to be created by rules eſtabliſhed in courts having the juriſdiction of truſts, theſe rules having gone no further than to caſes of purchaſes made by one man in the name of another; where, if the nominee is a ſtranger to the purchaſor, the implication of a truſt is neceſſary. But no caſe has extended an implied truſt, as between a leſſor and leſſee; nor is it poſſible that an implied truſt can ſubſiſt between parties in that

that relation, becauſe every leſſee is a purchaſor by his contract and his covenants, which excludes all poſſibility of implying a truſt for the leſſor; and therefore, if in that caſe there be any truſt at all, it muſt be declared in writing. 7 *Bro. P. C.* 532. 1778. *Luttrell* v. *Irnham.*

6. A perſon is a truſtee if he takes an inheritance, after notice of articles to ſettle the eſtate. In *Scacc. Com. Rep.* 700. 1710. *Skirme* v. *Meyrick.*

7. Where an eſtate is purchaſed in the name of one, and the money paid by another, it is a truſt, though there be no declaration in writing by the nominal purchaſor. 1 *Atk.* 59. 1739. *Ryall* v. *Ryall.*

8. Deviſe of his undivided moiety of ſugar houſes, and ſtock in trade to his ſon *E. C.*, nevertheleſs, in caſe his ſon *E. C.* ſhall depart this life without a ſon or ſons, then and in ſuch caſe he recommended it to him to give the ſugar houſes and ſtock to his other ſon, the plaintiff in the cauſe; *E. C.* died without having a ſon, but leaving a daughter; held it was not a truſt for the other ſon, but a mere recommendation. *Ambl.* 686. *May* 1770. *Sir Robert Cunliffe* v. *Lady Cunliffe.*

Words of deſire or requeſt in a will, if the property be certain and the objects certain, are ſufficient to raiſe a truſt. Glynn v. Harding, 1 Atk. 460. Vernon v. Vernon, Ambl. 4. Harland v. Trigg, 1 Bro Ch. Rep. 142. Nowlan v. Nelligan, 1 Bro. Ch Rep. 489. Pierſon v. Garnet, 2 Bro. Ch. Rep 38. 226. *So alſo words, not doubting but that the deviſee or legatee will diſpoſe of the fund deviſed in a particular manner, if the fund be certain, and the objects diſtinctly deſcribed, will be ſufficient.* Maſſey v. Sherman, Ambl. 520. Wynne v Hawkins, 1 Bro Ch, Rep. 179. Nowlan v. Nelligan. 1 Bro. Ch. Rep. 491. *But ſee* 9 Modern, 22 Buggins v Yates. *And it ſeems now to be ſettled, that words merely of recommendation, by a perſon having power to command, ſhall create a truſt.* Malin v. Reighly, 2 Veſ. jun. 333. 529. Puſhman v. Tilliter, 3 Veſ. 7. *But ſee* Bland v. Bland, 24*th* February 1745. Le Maitre v. Banniſter, 26*th* Nov 1770, *ſtated in Mr.* Finch's *note to* Eales v. England, Prec. Ch. 200. Cunliffe v. Cunliffe, Ambl. 686. *See alſo* Curl v. Rich, 1 Ch. Ca. 310. *And ſee the obſervations of the Maſter of the Rolls* (*Lord* Kenyon) *in deciding* Peirſon v. Garnet, 2 Bro. Ch. Rep. 38.

9. Bequeſt of an annuity out of land to churchwardens, to keep a family vault in repair, is void at law; but the heir at law ſhall be ſubject to the truſt. *Ambl.* 644. 1767. *Gravenor* v. *Halum.*

10. Where teſtator deſires all his money may be diſpoſed of as land, or *vice verſa*, that is a direct truſt, and will be executed in equity. 2 *Veſ. jun.* 176. 1793. *Walker* v. *Denn.*

11. The ſtat. of frauds requires, not that a truſt ſhall be created by writing, but that it ſhall be proved by writing, which may be ſubſequent to the commencement of it; and a truſt may be raiſed by implication from letters and a paper referred to by them, and in the hand-writing of the party, though not ſigned or dated; and by operation of law from advances of money. 3 *Veſ. jun.* 696. 1778. *Forſter* v. *Hale.*

21 Vin. 496. (D) Conſtruction of Truſts. In Equity. In general. How.

1. SIR *Thomas Sandys* by will directs his truſtees to convey a full fourth part of all his freehold lands, *&c.* to the uſe of his daughter *Priſcilla* for life, and ſo as ſhe alone, or ſuch perſon as ſhe ſhall appoint, take and receive the rents and profits thereof, and ſo as her huſband is not to intermeddle therewith, and from and after her deceaſe, in truſt to the heirs of the body of the ſaid *Priſcilla* for ever; this being an executory truſt, the wife took an eſtate for *life* only, and the huſband therefore not entitled to be tenant by the curteſy. 1 *Atk.* 607. 1738. *Roberts* v. *Dixwell.*

2. "I give and deviſe my lands at *C.* to *Robert Colſon*, my "grandſon, for life, remainder to *A.* and *B.*, and their heirs, to "ſupport contingent remainders during the life of *Robert Colſon*, "remainder to the heirs of *Robert Colſon* lawfully begotten." The queſtion was, whether *Robert Colſon* had an eſtate for life, or in tail. And it was decided, that by reaſon of the remainder interpoſing between the deviſe to *Robert* for life and the ſubſequent limitation to the heirs of his body, the ſaid *Robert* took an eſtate for life, not merged by the deviſe to the heirs of his body, but that by that deviſe an eſtate tail in remainder veſted in the ſaid *Robert.* 2 *Atk.* 247. 1741. *Colſon* v. *Colſon.*

3. *Benjamin Alliſon* deviſes lands to *B.* and *C.* and their heirs *in truſt* by rents and profits, ſale or mortgage, to pay his debts and funeral expences, and after in truſt as to a moiety to the uſe of his nephew *Thomas Bagſhaw* for life, without impeachment of waſte; remainder to truſtees and their heirs during the life of the ſaid *Thomas Bagſhaw*, to preſerve the contingent remainders, with remainder to the uſe of the heirs of the body of *Thomas Bagſhaw*, with remainders to his nephew *Benjamin Bagſhaw* for life, *ſans* waſte, remainder to truſtees to preſerve contingent remainders, with remainder to the uſe of the heirs of the body of *Benjamin Bagſhaw*, with remainders over. It is to be obſerved, that there are two material differences between this caſe and the caſe of *Colſon* v. *Colſon*, *ſupra*, (*viz.*) the clauſe *ſans waſte*; and 2dly, this was a truſt; and the court decreed that *Benjamin Bagſhaw* took only an eſtate for life. 2 *Atk.* 583. 16 *G.* 2. *Bagſhaw* v. *Spencer.*

The rule of conſtruction of limitations, including or carrying the legal eſtate, whether an immediate deviſe, or a truſt executed, is the ſame both at law and in equity; but whether the diſtinction between ſuch truſts as are executed, and ſuch as are purely executory, is ſtill a ſound, ſubſtantial, and effectual diſtinction, or not, vide Fonb. Treat. on Eq. 406, 407. *and the caſes there cited.*

4. The conſtruction of truſts of real and perſonal eſtates in equity is according to the limitations of a legal eſtate; unleſs there be a plain intent to the contrary. 2 *Veſ.* 655. 1775. *Garth* v. *Baldwin.*

5. Deviſe

5. Deviſe of 20,000*l.* in truſt for teſtator's relations who ſhould not be worth 2000*l.*, and who ſhould claim within two years; one claimed, and the claim was allowed, and a ſum of money ordered, but the claimant died before payment, it was ordered to be paid to her executor. Another claimed, but died before any part of the legacy was applied. It was ordered, that her executor ſhould be paid what the truſtees ſhould think proper. Another within the deſcription *en ventre ſa mere* at the death of the teſtator, and born ſoon after, claimed, but his claim was overruled. *Amb.* 708. 1772. *Bennett* v. *Honywood.*

6. In conſideration my wife has promiſed to give what I ſhall give her to her and my children at her death, I give, *&c.*; held a truſt for her children after her death. *Amb.* 519. 1751. *Clifton* v. *Lombe.*

7. Deviſe to my wife, not doubting ſhe will diſpoſe of the ſame amongſt my children as ſhe ſhall pleaſe, a truſt for teſtator's children according to her appointment. *Amb.* 520. 1739. *Maſſey* v. *Sherman.*

(E) Reſulting Truſts. What.

21 Vin. 496

1. WHERE the lord of a manor, by feoffment, grants certain parcels of common or waſte lands to truſtees, for the benefit of themſelves and the reſt of the tenants of the manor: the whole of the lord's intereſt paſſes, and there is no reſulting truſt for him, as to the ownerſhip of the ſoil. 5 *Bro. P. C.* 326. 1758. *Right Hon. Viſcount Irwin* v. *Simpſon and others.*

2. Conſtructive truſts, or truſts reſulting by implication, are not within the ſtatute of frauds and perjuries, but ariſe from the apparent nature of the tranſaction. 6 *Bro. P. C.* 12. 1764. *Eſpinaſſe* v. *Lowe.*

3. Parol evidence of a truſt is not admiſſible. *Ibid.*

4. In all queſtions of reſulting truſts, the rule of judgment muſt be the nature and circumſtances of the caſe, and not the general rule; for none ſuch there is, and none there can be. 6 *Bro. P. C.* 480. 1772. *Iſdele* v. *Fitzgerald.*

5. *J. S.* grants a leaſe to *A.*, which is intended to be in truſt for the leſſor, and *A.* declares the truſt thereof in writing accordingly; this leaſe is afterwards ſurrendered, and *J. S.* grants a new leaſe to *B.*, without any truſt being declared. Held, that *B.* was entitled to the whole benefit of the new leaſe, and that there was no reſulting truſt for the repreſentative of *J. S.* *Bro. P. C.* 526. 1778. *Pilkington* v. *Bayley.*

6. If a receiver lay out all the money received in land, or an executor realize all his teſtator's aſſets, and die inſolvent, yet a court of equity cannot charge or follow the land: but where *A.* received a ſum of money, which he covenanted to lay out in land to be ſettled to certain uſes, and afterwards purchaſes an eſtate which he does not ſettle, but does by writing own that it was made

made with the truſt-money, this binds the eſtate. 2 *P. Wms.* 415. *Eaſt.* 1727. *Degg* v. *Degg.*

7. An executor in truſt for an infant of a leaſe for 99 years, determinable upon three lives. On the lord's refuſing to renew, but for lives abſolutely, complies with the lord and changes the years into lives, on the infant's dying under 21 and inteſtate, this ſhall be a truſt for his adminiſtrator, and not for his heir. 3 *P. Wms.* 100. 1730. *Witter* v. *Witter.*

8. *A.* among other legacies gives a legacy of 5*l.* to *B.* his brother and heir, and then makes his wife *C.* his ſole *heireſs* and executrix of all his lands, tenements, goods and chattels, the ſame to ſell and diſpoſe of as ſhe ſhould think proper, to pay his debts and legacies; this is a gift to her of the ſurplus, and not a reſulting truſt for the heir. 3 *P. Wms.* 193. *Mich.* 1730. *Rogers* v. *Rogers.*

9. *A.* deviſes a rent-charge to be ſold to pay legacies, amounting to 800*l.*, and if the rent-charge ſhould ſell for 1000*l.*, the teſtator gives a further legacy of 200*l.*: it ſells for more than 800*l.*, and leſs than 1000*l.*: the exceſs beyond the 800*l.* ſhall belong to the heir as a reſulting truſt. 3 *P. Wms.* 252. *Eaſt.* 1734. *Stonehouſe* v. *Evelyn.*

10. In the caſe of voluntary ſettlements and wills, if there be no declaration of the truſt of a term it reſults to the donor; otherwiſe where it is a ſettlement for a valuable conſideration, and in the nature of a contract for the benefit of the wife and of the iſſue. 1 *Atk.* 191. 1744. *Brown* v. *Jones and others.*

11. *A.* buys a copyhold eſtate for his own and two lives in the manor of ———, where the cuſtom was, that whoſoever purchaſes in it, his eſtate ſhall go in ſucceſſion, and by his will deviſes all his eſtates, real and perſonal, to his wife, though the legal intereſt be according to the cuſtom of the manor, yet *A.* has an equitable intereſt from being the ſole purchaſor, and it ſhall be conſtrued as a truſt for him, he having advanced the money. 1 *Atk.* 385. 1737. *Smith* v. *Baker.*

12. Where an eſtate is limited to an anceſtor for life, and afterwards to the heirs male of his body, the eſtates are connected, and make an eſtate tail in the anceſtor, where it is by the ſame conveyance: the ſame has been held where it did not ariſe by the ſame conveyance, but by way of reſulting uſe, and the Lord Chancellor inclined to think, that the reſulting truſt of a freehold, to ſupport contingent remainders, might connect in the ſame manner with the limitation in tail, though not created together with it. 1 *Atk.* 595. *Marh* 1738. *Hopkins* v. *Hopkins.*

13. *R. S.* incumbent of the rectory of *B.* deviſes his perpetual advowſon, donation, and patronage of the pariſh church of *B.*, and all glebe lands, profits and appurtenances to the ſame belonging, to *G. S.*, willing and deſiring her to ſell and diſpoſe of the ſame to *Eton* college, and on their refuſal to *Trinity* college *Oxford*, and on refuſal, to any college in *Oxford* or *Cambridge*, who will be the beſt purchaſor. There is in this caſe no reſulting

reſulting truſt of the advowſon to *B.* to the heirs at law of the teſtator, but a deviſe of the beneficial intereſt therein to *G. S.* with an injunction only to ſell to particular ſocieties. 1 *Atk.* 618. 1738. *Hill* v. *Biſhop of London.*

14. The general rule, that where lands are deviſed for a particular purpoſe, that what remains after that purpoſe is ſatisfied, reſults, admits of ſeveral exceptions. *Ibid.*

15. There can be no conſtructive truſt, but where the intent of the teſtator is apparent; willing and deſiring *G. S.* to ſell, *&c.* are more properly words of injunction than truſt. *Ibid.*

16. Where a real eſtate is deviſed to be ſold for payment of debts, and no more ſaid, there is clearly a reſulting truſt. *Ibid.*

17. *W. H.* by will deviſes the perpetual advowſon of *S.* to *W. A.*, *&c.* upon truſt to preſent his ſon *W.* to this living, and that after the church ſhall next after his death be full of an incumbent, then to ſell the perpetuity, and to apply the profit ariſing from the ſale, firſt for payment of debts, and the overplus he diſtributes in thirds to his daughters; the truſtees preſented *W.* the ſon, who died before the advowſon was ſold, leaving a daughter an infant, who by her next friend brings her bill, inſiſting, after debts and legacies paid, there is a reſulting truſt to the heir at law of the teſtator in the advowſon, but the court thought otherwiſe. 1 *Atk.* 621. 1739. *Hawkins* v. *Chappel.*

18. Where executors are declared to be only truſtees, or have particular legacies given to them, the reſidue ſhall be conſidered as undiſpoſed of. 2 *Atk.* 18. 1739. *Graydon* v. *Hicks.* *Read* v. *Snell*, 2 *Atk.* 643. S. P.

19. *Grace Lawſon* gives the reſidue of her ſtock in trade in truſt for the ſeparate uſe of her daughter, and appoints her executrix of her will, but makes no diſpoſition of the ſurplus. This is not a legacy, but an exception out of the ſtock the teſtatrix had given to her ſon, and does not exclude the daughter from the ſurplus. 2 *Atk.* 45. 1740. *Newſtead* v. *Johnſton.*

20. Where the reſidue is undiſpoſed of, and a teſtatrix has always declared that the next of kin ſhall have nothing, executors, though they are legatees, ſhall have the reſidue. 2 *Atk.* 68. 1740. *Bracebridge* v. *Woodroffe.*

21. Where an eſtate is purchaſed in the name of one perſon, and the money is paid by another, it is a reſulting truſt; or where it is declared only as to part, and nothing ſaid as to the reſt, what remains undiſpoſed of reſults to the heir at law. 2 *Atk.* 150. 1740. *Lloyd* v. *Spillor.*

22. The plaintiff, whilſt a papiſt, aſſigned an advowſon to the defendant *Fletcher* for the term of 99 years, and having conformed, has brought his bill for a re-aſſignment of the term, ſuggeſting he had only aſſigned it in truſt for himſelf, and to avoid the penalties of the ſtats. 3 *Jac.* 1. and 1 *W. & M.* Defendant pleaded the ſtat. of frauds and perjuries in bar to the diſcovery, but by his anſwer admitted, that the advowſon was aſſigned to

him for the purpoſes charged in the bill, and that he never intended to take any benefit of it to himſelf, otherwiſe than in preſenting the other defendant *Login* to the church upon the next avoidance, for that he was recommended by Mr. *Login* to the plaintiff as a proper perſon for a grantee, and he did not know the plaintiff above a month before the grant: if the plea had ſtood alone it might have been ſufficient, but, coupled with the anſwer, which confeſſes the facts, it muſt be over-ruled, for if the admiſſion in the anſwer amounts to a confeſſion of a truſt for the defendant *Login* as to the firſt avoidance, the conſequence is, a reſulting truſt for the plaintiff after the preſentment to *Login* is performed. 2 *Atk.* 155. 1740. *Cottington* v. *Fletcher.*

23. Where there are two executors, and a legacy is left to one for mourning for himſelf, his wife and children, he ſhall have a moiety of the reſidue notwithſtanding. 2 *Atk.* 222. *Nov.* 1741. *Buſſar* v. *Bradford.*

24. Truſts by implication ariſe where one perſon pays the purchaſe-money, and the conveyance is taken in the name of another; but the rule is not ſo large as to extend to every voluntary conveyance. *Young* v. *Peachy*, 2 *Atk.* 256. *Feb.* 1741.

25. A bare intention, or even negative words will not exclude an heir at law from inſiſting on a reſulting truſt. 2 *Atk.* 566. 1742. *Cook* v. *Duckenfield.*

26. In this caſe the legacy was to be paid out of the real eſtate, and the legatee died before the contingency happened, on which he was to take; therefore the legacy was conſidered to ſink into the eſtate for the benefit of the heir at law. 3 *Atk.* 112. 1744. *Attorney-General* v. *Mildres.*

27. If a child, who has a legacy payable out of land, dies before the contingency happens, it goes to the heir: *a fortiori* where it is given to a ſtranger. *Ibid.* 113.

28. General *Pultney* by his will gives to Mrs. *Ann Watſon* the yearly ſum of 400*l.*, payable quarterly; and in the laſt clauſe gives her all his houſehold goods and furniture, (three pictures excepted) and all his plate, linen, watches, jewels, and clothes whatſoever, and declared her ſole executrix. The bill was brought for an account of ſuch part of the perſonal eſtate as was undiſpoſed of, and for a diſtribution. The bequeſts of the ſpecific things to Mrs. *Watſon* excludes her from the reſidue. 3 *Atk.* 226. 1745. *Southcot* v. *Watſon.*

29. Legacy to *A.* and *B.*, executors of the will, and land deviſed to *C.*, to pay 1000*l.* to the executors, the reſidue to a charity. The 1000*l.* is a charge on the real eſtate, which is void by the mortmain act, and reſults to the heir. 1 *Veſ.* 108. 1748. *Arnold* v. *Chapman.*

30. Deviſe in truſt for a child of the teſtator's daughter, and if ſhe die without iſſue then over; the intermediate profits till the contingency happens accumulate and deſcend to the heir. 1 *Veſ.* 490. 1750. *Gibſon* v. *Lord Mountfort.*

31. Diſtinct

31. Diſtinct *ſpecific* legacies of unequal value to ſeveral executors, does not exclude them from the ſurplus. 2 *Veſ.* 27. 1750. *Blinkhorn* v. *Feaſt.*

32. *G. Berkeley* made his will, and thereby after making *Young* and *Broom* his *whole and ſole* executors, as to his perſonal eſtate he diſpoſed of as follows: among ſeveral other legacies he gives to his worthy friend *Wm. Broom* a mortgage he had on the eſtate of *Wm. Broom* himſelf, with all the intereſt due thereon, to be divided equally between the daughters and a niece of *Wm. Broom*, on their marriage, provided with conſent, or at his death; and at their deaths to be divided between the two ſons of *Wm. Broom*. To *Young* he gave a bond of 200*l.*, which was owing to him the teſtator by the other executor *Broom*. Then comes the reſiduary clauſe, "*Item.* After all my juſt debts and legacies paid, I give "and bequeathe the remainder of my eſtate, real and perſonal, "and whatſoever ſhall be due to me for half-pay, *&c.* without "ſaying more;" held, the reſidue was a reſulting truſt for the next of kin. 2 *Veſ.* 91. 1750. *Biſhop of Cloyne* v. *Young.*

33. Money legacy to next of kin, as well as to executors, does not prevent the next of kin from claiming the reſidue of the perſonal eſtate, though ſuch legacy be but a ſhilling. 2 *Veſ.* 162. 1750. *Andrew* v. *Clark.*

34. One executor, a ſpecific and reſiduary legatee, dies in the teſtator's lifetime; it does not go to the next of kin, but lapſes to the other executor, having no legacy, though a real eſtate in fee was deviſed to his wife. 2 *Veſ.* 166. 1750. *Wilſon* v. *Ivat.*

35. *Theophila Moor* deviſed all her worldly ſubſtance, after payment of debts and funeral expences, to *Mary Lovemore*, to be paid her at 21 or marriage, which ſhould firſt happen, provided ſhe married with the conſent of ———; or in caſe ſhe dies before attaining 21 or marriage as aforeſaid, then all her worldly ſubſtance to ———: the teſtatrix makes the defendants executors, heartily requeſting them to be ſo kind as to take on them the execution of the will. *Mary Lovemore* dying under age and unmarried, the executors were held truſtees for the next of kin. 2 *Veſ.* 493. 1752. *Lord North and Guildford* v. *Purdon.*

36. The teſtator's wife was in this caſe excluded from taking the undiſpoſed reſidue as executrix, by having a legacy. Where a reſulting truſt is inſiſted on in oppoſition to the legal operation of a will, parol evidence may be admitted to rebut that equity. *Amb.* 126. 1751. *Lake* v. *Lake.*

37. A reſulting truſt of a copyhold eſtate, as well as of a freehold, is within the ſtatute of frauds. *Amb.* 151. 1752. *Withers* v. *Withers and others.*

38. Deviſe of lands to be ſold, and part of the money ariſing by the ſale to go to *charitable uſes*, and the reſidue of the money is given over; ſo much as is given in mortmain ſhall lapſe to the heir, and not go to the reſiduary legatees. *Amb.* 643. 1767. *Gravenor* v. *Hallum.*

39. Executors had each 300*l.* legacies; the reſidue which was deviſed, but which became lapſed, held to go to the next of kin. *Amb.* 768. 1777. *Nicholls* v. *Criſp and others.*

40. Deviſe to a body corporate in truſt, failing by the ſtatute of mortmain, the uſes are not defeated by the deficiency of the truſtee; but faſten upon the eſtate the law raiſes, and the heir at law is a truſtee to the uſes of the will. 1 *Bro. Ch. Rep.* 81. 1780. *Sonley and others* v. *The Maſter, &c. of the Clockmakers' Company.*

41. *W. W.* conveyed eſtates in fee to truſtees to ſell and pay debts, *&c.* and afterwards to apply the reſidue as follows: to raiſe 1500*l.* and pay intereſt to *D.* till marriage, and pay the principal to *D.* within twelve months after marriage, then to divide the reſidue in ſhares among the plaintiffs. By will he gave out of other lands a charge for another daughter, the reſidue to the plaintiffs. *D.* died unmarried; the 1500*l.* reſulted to the ſettlor as a reſulting truſt, but in his hands was perſonal eſtate, and paſſed as part of the reſidue. 1 *Bro. Ch. Rep.* 86. 1780. *Hewitt* v. *Wright.*

42. Teſtator by his will, dated the 22d of *September* 1781, deviſed to the plaintiff his wife a real eſtate. He alſo bequeathed to her his houſe in town, his plate, *&c.* (but no pecuniary legacy) and made her executrix. She was held a truſtee as to the reſidue for the next of kin. 1 *Bro. Ch. Rep.* 154. 1782. *Martin* v. *Rebow.*

43. A man dying poſſeſſed of leaſehold property, which he orders to be ſold, and the money paid to a charity, which is prevented from taking by the ſtatute of mortmain; the executor having a legacy, and there being no next of kin, is a truſtee for the crown. 1 *Bro. Ch. Rep.* 202. 1783. *Middleton* v. *Spicer.*

44. Where unequal legacies were given to executors, by their own names, they ſhall nevertheleſs take the reſidue. 1 *Bro. Ch. Rep.* 328. 1783. *Bowker and others* v. *Hunter and others.*

45. Teſtator gave ſeveral legacies, and ordered his real and perſonal eſtate to be ſold, his debts and legacies paid, and the reſidue to certain legatees, in the proportion of their legacies; two of the legatees died living the teſtator, theſe ſhares are lapſed, and ſo far as they are conſtituted of perſonal eſtate ſhall go to the next of kin, and ſo far as they are conſtituted of real eſtate ſhall go to the heir at law. 1 *Bro. Ch. Rep.* 503. 1779. *Ackroyd* v. *Smithſon.*

46. *E. C.* conveyed ſeveral ſums of money to truſtees to be laid out in land to be ſettled to the uſe of himſelf for life, remainder as to the lands, to be purchaſed with different ſums, to ſeveral of the ſame uſes, but with different ultimate remainders: by will he gave leaſehold eſtates and a mortgage to ſecure annuities, the ſurplus intereſt or rents of the lands to be purchaſed to be paid to *R. C.* for life, and to be ſettled in the ſame manner as his other eſtates. It being uncertain which of the limitations the deviſe was to follow, it being, as to the ultimate remainder, the intermediate uſes being ſpent, undiſpoſed of, goes to the heir at law

as a reſulting truſt. 2 *Bro. Ch. Rep.* 187. 1787. *Leſlie* v. *Duke of Devonſhire.*

47. Teſtator gave to truſtees for a term, remainder to *A.* and *B.* for life: the truſts of the term were to pay the ſcheduled debts of *A.* and *B.*, and to make them an allowance; the debts being ſtated to be paid, a truſt reſults to *A.* and *B.* A demurrer by the truſtees to a bill by creditors for an account as having no intereſt was therefore over-ruled. 2 *Bro. Ch. Rep.* 203. 1787. *Davidſon* v. *Foley.*

48. Real and perſonal eſtate being given to truſtees to be ſold, and converted into perſonalty, the truſtees to pay the produce to *A.* for life without further diſpoſition, the reſidue does not go to the truſtees, as undiſpoſed of, though they were made executors, and one of them had a legacy, but is a reſulting truſt for the heir for ſo much as was the produce of the real eſtate, and as to the perſonal for the next of kin. 2 *Bro. Ch. Rep.* 589. *Eaſt.* 1789. *Robinſon* v. *Taylor.* 1 *Veſ. jun.* 44. S. C.

49. Teſtatrix made defendants truſtees: by a codicil ſhe made them executors, and ordered them to be paid for journies and expences. This ſhews her intention to make them executors in truſt only. 2 *Bro. Ch. Rep.* 634. 1789. *Dean* v. *Dalton.*

50. Where a reſidue is given to a perſon who dies in the life-time of the teſtator, by which the gift is lapſed; ſtill the executors, though they have no legacies, are truſtees for the next of kin. 3 *Bro. Ch. Rep.* 28. 1789. *Bennet* v. *Batchelor.*

1 Veſ. jun. 63. S.C. Vide Kennedy v. Staniſley, in notis, S. P.

51. Teſtator gave his brother and nephew legacies, and appointed them executors, but did not diſpoſe of the reſidue. They were indebted to him in unequal ſums; this is no releaſe of the debts, and they are truſtees for the next of kin as to the reſidue. 3 *Bro. Ch. Rep.* 110. 1790. *Carey* v. *Goodinge.*

52. Teſtator ordered his real eſtate to be ſold, and the reſidue to be laid out in the funds, to remain for 10 years, and at the end thereof gave the ſame to his *next of kin: the next of kin at the time of the death* would be entitled to take; and the teſtator having but one brother, who was ſuch next of kin, and who died within the ten years, it is lapſed, and ſo much as was produced by the real eſtate reverts to the heir at law of the teſtator, and ſo much as was perſonalty to the repreſentatives of the brother. 3 *Bro. Ch. Rep.* 355. 1791. *Spink* v. *Lewis.*

53. The reſidue of a mixed fund given by a citizen of *London* in mortmain reſults to the heir at law, and next of kin in proportions. 4 *Bro. Ch. Rep.* 409. *July* 1793. *Middleton* v. *Cater.*

54. Executor having a ſpecific legacy was held a truſtee for the next of kin. 1 *Veſ. jun.* 344. 1791. *Nourſe* v. *Finch.* 2 *Veſ. jun.* 78. S. C.

55. Executor is entitled to an unbequeathed reſidue, unleſs there is a ſtrong and violent preſumption againſt him: a legacy to him affords ſuch preſumption: but parol evidence of the intention is admiſſible to rebut that; and is not to be confined to the time of making the will: but it muſt be to ſhew the intention to

that time only. But where the intention of the teſtator appeared in the will and by parol evidence, the unbequeathed reſidue was decreed to the executor. 2 *Veſ. jun.* 465. 1794. *Cleunel* v. *Leuthwaite, and Thornton* v. *Tracey.*

56. Real and perſonal eſtate deviſed to the executor in truſt to pay debts and legacies; the reſt and reſidue to himſelf: the only purpoſe of deviſing the real appearing to be to inſure payment of the debts, without any intention to diſinherit the heir, it was held only a charge, and that the heir was entitled to the ſurplus of the real eſtate. 3 *Veſ. jun.* 210. 1796. *Halliday* v. *Hudſon.*

57. Settlement upon marriage of the wife's property only upon certain truſts for the huſband, wife, and children: in one event for the huſband abſolutely, but making no proviſion for the event, which happened, a reſulting truſt for the wife. 3 *Veſ. jun.* 467. 1797. *Langham* v. *Nenny.*

58. Upon a deviſe to a charitable uſe, which is valid, the heir of the teſtator has no right to the rents and profits accrued, before the deviſe is carried into effect. 3 *Veſ. jun.* 714. 1798. *Attorney-General* v. *Bowyer.* But it was ſaid in this caſe by the Lord Chancellor, that where there was a deviſe upon a future contingency, and no intermediate diſpoſition of the rents and profits, there was a reſulting truſt for the heir. *Ibid.* 725.

59. One executor being by a legacy for his care clearly a truſtee of the reſidue for the next of kin, the other muſt be a truſtee alſo. 4 *Veſ. jun.* 21. 1798. *White* v. *Evans.*

60. Where it appears by expreſs declaration or plain inference that executors are not intended to take the reſidue beneficially, they are truſtees: a legacy is only one mode of ſhewing it; and if expreſſed to be for care and trouble, parol evidence cannot be admitted. *Ibid.* 22. See alſo 4 *Veſ. jun.* 729.

61. Executor having ſpecific bequeſts by the will and codicil held a truſtee for the next of kin as to the reſidue undiſpoſed of. 4 *Veſ. jun.* 76. 1798. *Helford* v. *Wood.*

62. Teſtatrix by will appointed an executor, and gave him a legacy: afterwards, by a teſtamentary paper, ſhe directed the reſidue to be diſpoſed of according to private inſtructions to him; and having, by a ſubſequent codicil, added another executor, died without giving any inſtructions; the executors are truſtees of the reſidue for the next of kin. 4 *Veſ. jun.* 117. *Aug.* 1798. *Mordaunt* v. *Huſſey.*

63. A partnerſhip *in London* being appointed, not individually, but as a firm, executors and guardians claimed the reſidue undiſpoſed of in excluſion of perſons appointed attornies, executors, and guardians in *Denmark*, and others appointed attornies and executors in *India*; it was decreed a truſt for the next of kin. 4 *Veſ. jun.* 644. 1799. *De Mazar* v. *Pybus.*

64. Bequeſt of various particulars, comprifing all the teſtator's perſonal eſtate to his wife for life; then, after ſpecifically diſpoſing of, and charging with legacies certain parts after the death of his wife, he appointed her executrix, ſhe paying his debts and funeral

funeral expences; held a reſulting truſt as to the reſidue for the next of kin according to the ſtat. of diſtributions. 4 *Veſ. jun.* 725. 1799. *Dick* v. *Lambert.*

65. Bequeſt to an executor by way of exception is not ſufficient to debar him of the reſidue undiſpoſed of. 4 *Veſ. jun.* 731. *Ibid.*

66. Executors having legacies of 20*l.* a-piece to buy mourning rings, and equal ſpecific legacies, were upon the former held truſtees of the reſidue for the next of kin. 5 *Veſ. jun.* 149. 1799. *Niſbett* v. *Murray & e contrà.*

67. To *William Abbott*, my eldeſt brother, I give 10*l.* as a legacy, and to his four children 10*l.* each: and to *Stephen Abbott* 10*l.* to him as a legacy, and to his three children 10*l.* each; and to *John Abbott*, deceaſed, his four children, three ſons, 10*l.* each, and to his daughter *Hannah Lumley* 20*l.*; and to my ſiſter *Sarah Nickles*, only daughter of *Eliz. Nickles*, 20*l.*; and to my brother *Thomas Abbott* 10*l.*, and to his only *daughter* 20*l.*; and the annuity of the *three Miſs* Vaughans, *of* Suffolk-ſtreet, Middleſex *hoſpital*, to my ſiſter *Mary Ellington*: ſhe to have it for her natural life, and her huſband *William Ellington* not to have any thing to do with it, but to be at her diſpoſal; and after her death to be divided among the ſurvivors, and added to the annuity 130*l.* during her natural life; and the ſaid *William Ellington* to have 5*l.* for mourning; and to my brother *Samuel Abbott* 20*l.* and to my brother *Joſeph Abbott*, of *Froome*, 10*l.*; and to five perſons, by name, one guinea each for a ring; and to my nephew *James Abbott* whole and ſole executor. *James Abbott*, the executor, who was one of the children of *William Abbott*, declared a truſtee for the next of kin. 6 *Veſ. jun.* 343. 1801. *Abbott* v. *Abbott.*

68. Bill by the heir at law againſt reſiduary legatees, deviſees, and executors; ſuggeſting a ſecret truſt, undertaken at the requeſt of the teſtator, either not legally declared, or if ſo, void, as to the real eſtate, and written acknowledgments by the defendants of a particular truſt for charitable purpoſes: the will alſo, by particular expreſſions, and equal legacies to them importing a truſt, a general demurrer to the diſcovery and relief was over-ruled. 6 *Veſ. jun.* 52. 1801. *Mockleſton* v. *Brown.*

(F) *Advancement.* What an Advancement, *and what a Truſt.* 21 Vin. 500.

1. A Father purchaſes lands in his ſon's name, his ſon being then 18 years of age, the father continued in poſſeſſion till his death, this ſhall be conſidered as an advancement for the ſon and not a truſt for the father. 1 *Atk.* 386. 1737. *Taylor* v. *Taylor.*

2. *Per* Lord Chancellor *Hardwicke.* The general rule has been admitted, and has been long the doctrine of the court, that notwithſtanding the father pays the whole money, yet if the pur-

chaſe be made in the name of a younger ſon, the heir of the father ſhall not inſiſt upon it as a truſt for the father. 2 *Atk.* 480. *Dec.* 1742. *Stileman* v. *Aſhdown.*

3. The reaſon why a purchaſe in the ſon's name, though the poſſeſſion continued in the father, has been held an advancement in the ſon, is becauſe the father is his natural guardian during his minority, but a purchaſe in the name of the father and ſon as *joint-tenants* is no advancement of the ſon, as it does not anſwer the purpoſe, for till a diviſion the father has the poſſeſſion of the whole, and even after it a moiety, beſides the chance of the other moiety by ſurvivorſhip. *Ibid.*

4. A father, upon his ſon's marriage, gives him a conſiderable advancement; and having ſeveral younger children beſides, who had no proviſion, he ſells an eſtate; but 500*l.* only of the purchaſe-money being paid, he took ſecurity for the remainder in the name of himſelf and his ſon. The father received the intereſt, and great part of the principal, without any oppoſition from the ſon, as did his executrix after his death, the ſon writing receipts for the intereſt. A queſtion was now made, Whether the ſon ſhould be conſidered a truſtee for the father, or intereſted in his own right. *Per* Lord Chancellor. No doubt, where a father takes an eſtate in the name of his ſon, it is to be conſidered as an advancement, but that is liable to be rebutted by ſubſequent acts; ſo if the eſtate be taken jointly, ſo as the ſon may be entitled by ſurvivorſhip; that is weaker than the former caſe, and ſtill depends on the circumſtances; the ſon knew here, that his name was uſed in the mortgage deed, and muſt have known whether it was for his own intereſt, or only as truſtee for the father; and inſtead of making any claims, his acts are very ſtrong evidence of the latter; nor is there any colour why the father ſhould make him any farther advancement when he had ſo many children unprovided for; and in uſing the ſon's name the father might have a view that the ſon ſhould be a truſtee rather than another. 1 *Veſ.* 76. 1747. *Pole* v. *Pole.*

21 Vin. 502.

(G) *Declaration of* Truſt *ſufficient.* What.

BY the ſtatute of frauds and perjuries all declarations of truſt muſt be in writing, otherwiſe they are void, except ſuch as ariſe by operation or by conſtruction of law; now truſts of this nature are when the legal intereſt is in another, but the purchaſe-money has been paid by a third perſon; this is a reſulting truſt for him who paid the money, but then he muſt clearly prove the payment. There is another way of taking the caſe out of the ſtatute, and that is by admitting parol evidence, within the rules laid down in equity, to ſhew the truſt from the mere circumſtances in the pretended owner of the real eſtate or inheritance, which makes it impoſſible for him to be the purchaſor. 2 *Atk.* 71. 1740. *Willis* v. *Willis.*

(H) Performed. How.

21 Vin. 504.

1. *A.* Conveyed 1000*l.* to truſtees to be laid out in the purchaſe of freehold land within 21 miles of *Cheſter*: the plaintiff, the firſt tenant in tail under a limitation from *A.* ſuggeſting that no ſuch purchaſe could be found, but that a convenient one might be had in *Lancaſhire*, prayed that the truſtee might be directed to purchaſe accordingly. Lord *Hardwicke* Chancellor, ordered the truſtee to look out for a purchaſe within the terms of the deed, and if no ſuch could be found, ſaid, he ſhould be inclined to deviate from the ſtrict terms of the truſt. 3 *Atk.* 413. 1746. *Maynwaring* v. *Maynwaring.*

2. On the marriage of *George Southcombe* with *Dorothy* his wife, by indenture of the 3d of *May* 1648, a leaſehold eſtate was aſſigned to truſtees to the uſe of *George Southcombe* for life, remainder to his wife for life, remainder to the children of the marriage, *with power to the father to appoint the whole or any part to any one or more of that marriage, if there ſhould be more than one.* There were four children of the marriage; and on the 3d of *May* 1668, by deed of appointment, in which the wife joined, *George*, the father, in conſideration of 80*l.* paid to him and 50*l.* to his ſon *George*, by *Lewis*, his eldeſt ſon, and for other conſiderations, appointed the eſtate to truſtees, as to one moiety to the uſe of himſelf for life; and as to the other moiety, immediately to the uſe of *Lewis* for life; remainder as to the whole to ſuch wife as *Lewis* ſhould marry for her life; remainder to the iſſue of the body, or child or children of *Lewis*; and for want of ſuch iſſue, to the uſe of the other ſons of *George Southcombe* the father, and of their ſons or iſſue male, or of ſuch one or more of ſuch other ſons of the ſaid *George Southcombe* to whom *Lewis* by deed or will ſhould give or diſpoſe of the ſame; and for want of ſuch iſſue male, to the executors or aſſigns of *Lewis* for the reſidue of the term. *Lewis* died without iſſue. *John* was the only ſurviving ſon, and afterwards died, leaving a ſon and daughter; the ſon is dead, and the daughter filed her bill to be relieved againſt the appointment, but the bill was diſmiſſed with coſts, the appointment under the particular circumſtances being held good. *Ambl.* 289. 1755. *Langſton* v. *Blackmore.*

3. Tenant for life under a will, with power to cut down ſuch trees as four perſons named in the will ſhould allow or direct; held, the check neceſſary to the execution of the power, and the truſtees being dead, the check devolved on the court. *Amb.* 508. 1765. *Hewitt* v. *Hewitt.*

4. Deviſe of all the teſtator's real and perſonal eſtate to his wife, to the end that ſhe might give his children ſuch fortunes as ſhe ſhould think proper, or they beſt deſerve. There being five children, and the eldeſt being provided for, an appointment of one guinea to him, and the reſt among the other children, was

held a good appointment. *Ambl.* 660. 1768. *Burrell* v. *Burrell.*

5. Teſtator gives 600*l.* to his wife to be by her diſpoſed of to and amongſt his three daughters, *in ſuch proportions and payable in ſuch manner* as ſhe ſhould think fit to give it in her lifetime, either by will or by any note or deed in writing ſubſcribed by her in the preſence of witneſſes, or by any other diſpoſition. The mother on the marriage of her daughter *Grace* by verbal agreement gave her 200*l.*, and afterwards making her will takes notice thereof as part and proportion of her ſhare of 600*l.*; and in further purſuance of her power gives her an additional 100*l.*: ſhe then gives her daughter *Anne*, who was dead, and to whom ſhe was executrix, her ſhare of 200*l.*, and declaring that as her daughter *Sarah* had behaved undutifully, and married the preſent plaintiff without her conſent, ſhe ſhould have only the remaining 100*l.*, and dies. Court of opinion, that the 200*l.* appointed to *Anne*, who was dead, was not executed properly; and that the ſame ſhould be divided between the two remaining daughters *Grace* and *Sarah*, the power being diſcretionary in the parent, and does not devolve upon the court. 1 *Veſ.* 58. 61. 1747. *Maddiſon* v. *Andrew.*

6. A collegiate body is compellable to execute a truſt as a private perſon. 1 *Veſ.* 468. 1750. *Green* v. *Rutherforth.*

7. Deviſe of 30,000*l.* to teſtator's wife for life, and afterwards to be diſtributed among his children as ſhe by deed, will, or inſtrument in nature of a will, ſhould appoint. Upon the ſecond marriage of teſtator's wife, a deed of ſettlement was made, wherein was an expreſs recital of the will; and a declaration that the intereſt of the 30,000*l.* ſhould remain to her ſeparate uſe: and then an expreſs covenant and agreement on the part of her ſecond huſband, that ſhe ſhould have power to make a will concerning the intereſt and improvement of that ſum. In 1736, her ſecond huſband then living, ſhe made a will; thereby reciting, that ſhe had before appointed 6000*l.*, part of the ſaid 30,000*l.*, for the benefit of her ſon-in-law Lord *Morpeth*, and 2000*l*, other part thereof, for her daughter Lady *Morpeth*, which ſhe intended as part of what ſhe propoſed to give her at her death, and ſhe appoints the remaining principal ſum to be paid to the ſeveral children of her ſaid firſt huſband, in the ſeveral proportions aftermentioned, *viz.* to the plaintiff 2000*l.*, to *John Spencer* 2000*l.*, to Lady *Bateman* 3000*l.*, and the reſidue, which ſhe computed at 15,000*l*, to Lady *Morpeth*. *John Spencer* and Lady *Morpeth* died in her lifetime after the making her will; their legacies were claimed by the plaintiff as being lapſed and unappointed, and therefore part of the reſidue belonging to *Robert*, whoſe executor the plaintiff was; and the court was of opinion that nothing *veſted* in *John Spencer* and Lady *Morpeth*, and conſequently that nothing was tranſmiſſible to their repreſentatives; and that the ſums appointed to them fell under the reſiduary bequeſt to the plaintiff as repreſentative of his brother. 2 *Veſ.* 61. *Nov.* 1750. *Duke of Marlborough* v. *Lord Godolphin.*

8. Truſtees

8. Truſtees having a diſcretion, it ſeems, on their not acting, the court cannot act in their place, unleſs for a charity. It is otherwiſe however where a rule is laid down for a truſt. 2 *Veſ.* 87. 1750. *Gower* v. *Mainwaring*, *ibid.* 110. S. C.

9. Power to appoint among children: each muſt have a part, not illuſory, nor reverſionary: but a particular intereſt, as for life, may be given to one, but not to grandchildren; nor can a diſcretion be given to another to appoint: but though that would be void, it would not devolve on the court to appoint, which is only where the power is well created, but by accident not executed by the party. Where given to thoſe not capable, the other perſon capable takes the whole. It cannot be given exempt from debts of appointee. 2 *Veſ.* 640. 1755. *Alexander* v. *Alexander.*

Under power of appointing a real eſtate to the uſe of ſuch child and children, &c. And where in default of appointment, the eſtate was ſettled to the uſe of all and every the child or children, one excluſive appointment to one is good; there is a diſtinction between a power of diſtributing perſonalty among younger children, and appointing a real eſtate; the natural conſtruction of the former is, to divide it, as in general there is no other proviſion; of the latter to give it to one child only, being a family eſtate. Per Aſhhurſt J. Durnf. & Eaſt, 432. *And an excluſive appointment under a power of appointing to and amongſt ſuch of his relations, was held good.* Durnf. and Eaſt, 432. note (*f*).

10. Words of deſire or requeſt muſt have a preciſe and diſtinct object: the words here were, "and all other my leaſehold eſtates, *&c. I give to my brother* John Harland *for ever, hoping he will continue them in the family.*" *John*, on the teſtator's death, entered and died, having made his will, whereby he gave the leaſehold eſtates to his wife, whom he made executrix. The court of opinion that the will did not import a deviſe, as the words did not clearly demonſtrate an object. 1 *Bro. Ch. Rep.* 148. 1782. *Harland* v. *Trigg.*

11. Power to appoint in ſuch ſhares, *&c.* as *J. P.* ſhould think proper, not exceeding eſtates tail: he appoints to *two* of his children one acre, for their lives and the life of the ſurvivor of them; then to fall into the reſidue of the eſtate, which he gave to his ſecond ſon for life, with remainders over. This execution of the power is illuſory and bad. 1 *Bro. Ch. Rep.* 450. 1785. *Packlington* v. *Bayne.*

12. Under a power to appoint to children; an appointment to a child for life, with remainder to her children, is not valid, but void for the exceſs. 2 *Bro. Ch. Rep.* 51. 1786. *Pitt* v. *Jackſon.*

13. Deviſe of perſonal eſtate for life, then among all the children of deviſee in ſuch ſhares and manner, for ſuch intereſts, with ſuch ſurvivorſhip, and to veſt at ſuch time, as deviſee for life ſhould by deed or will appoint: in default of appointment of the whole or part, equally, if but one, to that one, payable at 21; nevertheleſs, the ſhares of any attaining 21 in life of deviſee for life to be veſted; but payment to be poſtponed till her death: the clauſe veſting an intereſt at 21, held to relate only to the caſe of default of appointment; and one of two children being dead without iſſue after 21, and without receiving any ſhare, that circumſtance will not prevent an appointment of the whole fund to the ſurvivor.

An

An illuſory ſhare may be accounted for by circumſtances: a truſtee to appoint cannot appropriate part of the ſum appointed to himſelf. 1 *Veſ. jun.* 299. 1791. *Boyle* v. *Biſhop of Peterborough.*

14. 4000*l.* ſettled on marriage in truſt after the deceaſe of the huſband and wife, to pay among all and every the child and children, other than an eldeſt or only ſon, at ſuch times and in ſuch proportions as he, or ſhe, or the ſurvivor ſhould appoint by deed or will; for want of appointment, among ſuch child and children, other than, *&c.* equally to be divided; if but one, to that one; payable at 21 or marriage, or as ſoon after as the life intereſt ſhould drop; the ſhares of any dying before payable in the 4000*l.*, or ſo much as ſhould not be appointed, to go to the ſurvivors at the ſame time: there were four younger children: the marriage-ſettlement of one recited, that ſhe was entitled to 1000*l.*, part of this fund: one fourth of it was appointed to another on his marriage; and to a third 1000*l.* as her ſhare of the portion: the fourth died above 21, before his father, who ſurvived his wife and died without any other appointment: held that 3000*l.* was well appointed; and that the remainder veſted in all equally according to the direction for want of appointment. 2 *Veſ. jun.* 351. 1794. *Wilſon* v. *Piggott.*

21 Vin. 505. (I) Creditors. Truſt *for Payment of Debts favoured.*

1. A Gives his daughter 1000*l.* to be raiſed out of the rents and profits of his eſtate, *after payment of his debts*, but without mentioning any particular time of payment, this legacy will not carry intereſt while any of the teſtator's debts remain unſatisfied, nor will the court direct it to be raiſed by a ſale of any part of the teſtator's eſtate. 3 *Bro. P. C.* 503. 1730. *Small* v. *Wing.*

2. Debts and legacies are by will directed to be raiſed by perception of rents and profits, or by leaſing or mortgaging of the land: this reſtrains it merely to a payment out of rents, and the court cannot decree a ſale. 2 *Atk.* 106. 1740. *Ridout* v. *Earl of Plymouth.*

3. Deviſe in truſt to pay debts is out of the ſtatute of fraudulent deviſes; and truſtees to pay debts may fairly raiſe by ſale or mortgage without waiting for a decree. *Per* Lord *Hardwicke* Ch. 2 *Veſ.* 590. 1754. *Earl of Bath* v. *Earl of Bradford.*

4. A truſtee cannot ſell by *private* contract, after a bill brought by creditors, and ſubmitted to. *Amb.* 676. *Nov.* 1768. *Walker* v. *Smallwood.*

5. *T. B.* deviſed his eſtate to truſtees to pay *yearly rents and profits* in diſcharge of his wife's jointure, his ſiſter's annuities, and in payment of his debts, and the intereſt thereof; then to certain uſes. The creditors file a bill, praying a ſale; but this court cannot, under the deviſe, decree the eſtate to be ſold. 1 *Bro. Ch. Rep.* 311. 1783. *Lingard and others* v. *Earl of Derby and others.*

6. Teſtator

6. Teſtator made a general charge of his debts, upon his real eſtate, exempting his perſonalty from the payment thereof. He then deviſed a particular eſtate to truſtees for that purpoſe, excepting his capital manſion-houſe. The decree was, that the deviſed truſt eſtate ſhould be ſold for the payment of debts. The Maſter ſold the whole deviſed eſtate, except the manſion houſe, and upon its being referred to the Maſter to conſider whether a good title could be made, he reported there could not be a good title made to the manſion-houſe. On an exception to the Maſter's report, Lord *Thurlow* Chancellor ſaid, he was not aware that the gift of an eſtate for payment of debts, in a manner which could not anſwer the purpoſe, was ſuch a deviſe as would take the caſe out of the ſtatute of fraudulent deviſes; and that if the Maſter reported that the debts could not be paid by the means provided in the deviſe, he ſhould either here, or in the Houſe of Lords (unleſs the Houſe over-ruled him) order the eſtate to be ſold, notwithſtanding the ſtatute; and ſhould conſider it ſo far fraudulent. 2 *Bro. Ch. Rep.* 614. 1789. *Hughes* v. *Doulben.*

(K) *Set aſide* in Favour of Creditors, and of the Parties firſt in the Truſt. On Circumſtances. 21 Vin. 506.

A. Executed a deed, by which he conveyed chattels to *B.* in truſt as to one moiety for certain ſcheduled creditors, as to the other for *A.*'s own benefit. *C.*, a creditor not in the ſchedule, ſued *A.* and recovered and took out execution againſt the chattels in the hands of *B.* *B.* ſued the ſheriff's officer, and recovered at law. Bill for an injunction, on the ground that the deed was void againſt creditors for the moiety. Injunction refuſed; there can be no execution againſt goods in the hands of a truſtee. 2 *Anſtr.* 381. *Hil.* 34 *G.* 3. *Calliaud* v. *Eſtwick.*

(O) *Who ſhall be ſaid to be a Truſtee.* 21 Vin. 508.

1. BEQUEST of an annuity out of lands to churchwardens to keep a family vault in repair is void at law, but the heir at law ſhall be a truſtee. *Ambl.* 645. 1767. *Gravenor* v. *Hallum.*

2. An eſtate deviſed to a body corporate (which cannot take by the ſtat. of mortmain,) in truſt, the uſes are not defeated by this deficiency of the truſtee, but attach upon the eſtate the law raiſes, and the heir at law becomes a truſtee to the uſes of the will. 1 *Bro. Cha. Rep.* 81. 1780. *Tonley* v. *The Clockmakers' Company.*

3. Said, there is no doubt but that a corporation being a truſtee is the ſame as an individual, 2 *Veſ. jun.* 46. 1793. *Attorney-General* v. *Foundling Hoſpital.*

21 Vin. 509. (P) Truſtee. Who ſhall be ſeiſed as a Truſtee.

1. TENANT for life under a ſettlement of a crown leaſe, gets a renewal in reverſion, it ſhall go to the uſes of the ſettlement. *Ambl.* 668. 1768. *Taſter* v. *Marriott.*

2. One bequeaths ſeveral leaſehold eſtates, held for years under the dutchy of *Cornwall*, to his wife, during ſo many years of the term as ſhe ſhall live; and after her deceaſe, (if the term of the ſeveral leaſes be then in being,) unto and amongſt, &c. The wife got an additional term, and it was held, it ſhall not be for her own benefit, but ſhould go to the uſes of the will. *Ambl.* 715. 1773. *Mawe* v. *Chicheſter.*

3. A truſtee purchaſing a leaſehold farm, deviſed to him for the uſe of the plaintiff at an appraiſement, afterwards renewing the leaſe in his own name, and purchaſing part of the teſtator's ſtock, was declared to be a truſtee, and to be accountable for the ſame to the plaintiff. 4 *Bro. Cha. Rep.* 161. 1792. *Killick* v. *Flexney.*

4. Truſtee not having the legal eſtate, cannot hold againſt the crown claiming by eſcheat. 2 *Veſ. jun.* 170. 1793. *Walker* v. *Denne.*

21 Vin. 512. (Q) Truſtee. His Power.

1. TRUSTEES cannot make a proxy to vote in a perſonal truſt requiring judgment 1 *Veſ.* 417. 1749. *Attorney-General* v. *Scott.*

2. Truſtees for a pariſh having a right to elect a vicar cannot vote by proxy. *Ambl.* 82. 1747. *Wilſon* v. *Denniſon.*

3. A truſt conſiſting of 25 perſons, who are to proceed to elect new truſtees, ſo as to fill up their number when they ſhall be reduced to 15, may elect before that time. 1 *Anſtr.* 86. 33 G. 3. *Doe on dem. Dupleix and others* v. *Mal.*

4. A majority of truſtees may bring actions in the name of the whole. *Ibid.*

21 Vin. 512. (S) Truſtee. Power. Acts of Truſtees. How far prejudicial to *ceſtui que Truſt.*

1. TRUSEES poſtponing or accelerating the ſale of eſtates deviſed to them, will make no alteration in favour of the heir, to the prejudice of *ceſtui que truſts.* 1 *Atk.* 623. *Nov.* 1739. *Hawkins* v. *Chappel.*

2. Truſtees having a diſcretion, it ſeems on their not acting the court cannot act in their place, unleſs for a charity. 2 *Veſ.* 89. *Dec.* 1750. *Gower* v. *Mainwaring.*

3. It

3. It is otherwiſe where a rule is laid down for the truſt. 2 *Veſ.* 89. *Dec.* 1750. *Gower* v. *Mainwaring.*

4. Bill by deviſee in remainder to him and his heirs male of a leaſe for lives againſt tenant for life, alſo entitled in reverſion to him and his heirs, to compel him to procure a renewal, one life having dropped: the conſtruction of the will being that the leaſe ſhould be kept full, and that 500*l.* and no more ſhould be charged thereon for that purpoſe upon the dropping of each life, decreed, that if the plaintiff choſe to pay the exceſs, the leaſe ſhould be renewed, in truſt to ſecure the 500*l.* and ſubject thereto, for the defendant for life; after his deceaſe to raiſe the farther ſum advanced by the plaintiff for renewal and the expence of the ſuit, with compound intereſt at 4*l. per cent.* during the life of defendant, and ſubject thereto for plaintiff in tail male; remainder to defendant in fee; the defendant was not allowed to charge the eſtate with 500*l.* towards a fine paid by him upon a former renewal without the conſent of the remainder-man. 4 *Veſ. jun.* 24. *July* 1798. *White* v. *White.*

5. A general deviſee in truſt for the teſtator's widow and children, having received from the widow, who was executrix, on her going abroad to recover part of the property, bonds for a debt from him and his partners to the eſtate, in ſettling the affairs of the partnerſhip on the retirement of one partner, who had notice of the truſt, delivered to him the bonds, to be cancelled *without the privity of the ceſtui que truſts*; continuing to make remittances on that account from the funds of the new partnerſhip: the partner who retired is not diſcharged. 4 *Veſ. jun.* 36. *July* 1798. *Dickenſon* v. *Lockyer.*

6. Upon an inquiry directed on a re-hearing, the plaintiff appearing to have conſented to the former renewal in 1786, the defendant was held entitled to charge 500*l.* towards the fine upon that as well as all other renewals; and the decree was varied accordingly. 5 *Veſ. jun.* 554. *Aug.* 1800. *White* v. *White.*

7. There is no rule that a truſtee to ſell cannot be a purchaſor: but however fair the tranſaction, it muſt be ſubject to an option in the *ceſtui que truſt*, if he comes in a reaſonable time to have a re-ſale, unleſs the truſtee, to prevent that, purchaſes under an application to the court. 5 *Veſ. jun.* 678. *Dec.* 1800. *Campbell* v. *Walker.*

8. Aſſignees of a bankrupt removed on the ground that one of them had purchaſed the bankrupt's eſtates under the commiſſion for himſelf. A releaſe was directed, and the purchaſor to account for a profit gained by him upon a releaſe of part: but he was diſcharged from the purchaſe only conditionally, in caſe the leaſe ſhould produce more. 5 *Veſ. jun.* 707. *Dec.* 1800. *Ex parte Reynolds.*

21 Vin. 513. (T) Truſtee. Power. *Alienation by him.* How it operates.

AN alience is not affected by acts of the truſtee, but by notice of the truſt. 3 *Atk.* 754. 1753. *Garth* v. *Cotton.*

21 Vin. 513. (U) Acts of *ceſtui que Truſt*, and Truſtee. Of what Effect as to defeating the Truſt, and deſtroying contingent Remainders.

Vide F. A.

21 Vin. 518. (Z) Truſtee. Diſputes between Debtor and Creditor of *ceſtui que Truſt* and *ceſtui que Truſt* and Truſtee.

1. NO act of the truſtee can vary the right of the *ceſtui que truſt:* but his ſituation may; as where the *ceſtui que truſt* is his heir, the right to dower depends upon who dies firſt. 3 *Veſ. jun.* 341. 1797. *Selby* v. *Alſton.*

2. Truſtee for the purchaſe of land died without perſonal aſſets, but having purchaſed land; the eſtates purchaſed were held not liable to the truſt; the circumſtances affording no preſumption that they were purchaſed in execution of the truſt. 4 *Veſ. jun.* 108. 1798. *Perry* v. *Philips.*

21 Vin. 519. (A. a) In Caſes where a *Truſtee* is to convey. How he is to do it, and to whom.

1. A Court of equity may order an infant truſtee to levy a fine. *Com. Rep.* 615. *Hil.* 12 *Geo.* 2. *Anon.*

2. Teſtator deviſed thus: To my ſiſter *Mary Dixy* and her heirs for ever: and my will is, that the ſaid *Mary Dixy*, whom I make ſole executrix, ſhall in ſix months time after my deceaſe, by ſome writing or good aſſurance in the law, ſettle ſo much of my eſtate as ſhall remain after debts and legacies paid, on my brother *B.* for life, and on my ſiſter *E.* for ſuch time of her life as ſhe ſhall be a widow, if ſhe ſurvives her huſband: and from and after their deceaſe on any other perſon or perſons for their ſeveral lives, who are or ſhall be hereafter deſcended from my mother, as my ſaid ſiſter ſhall think fit; in ſuch manner and proportion, and ſubject to ſuch rules and directions, as ſhe ſhall in her diſcretion order and appoint: and ſhe may at any time during her life make void or change any appointment, and appoint or nominate any new perſon, to have and receive ſuch profit and advantage out of my eſtate as ſhe ſhall think fit; provided it may be to the deſcendants

of

of my mother; becauſe it is my deſire that my eſtate ſhould continue to perſons always deſcended from my mother; and for this purpoſe I adviſe, that a writing may be made to truſtees for 99 years, to the uſes aforeſaid: if ſhe die without executing the power, then my brother *B.* within *ſix* months after her deceaſe may do it; and on his dying without executing, any other relation ſhould appoint, with the conſent of the Lord Chancellor for the time. *Mary Dixy*, within ſix months after his death, appoints with power of revocation; afterward marries and revokes, and limits new uſes to truſtees to permit *W. Godolphin*, one of the plaintiffs, and a deſcendant of the mother, to receive the profits for his life, remainder to his firſt, *&c.* ſon, and the heirs male of ſuch ſons, and in the ſame manner to ſome other deſcendants of the mother, with remainder to the right heirs of the mother. And the queſtion was, Whether *Mary Dixy* had power by the will to limit an inheritance? And the court was of opinion that ſhe had ſuch power. 1 *Veſ.* 21. 1747. *Godolphin* v. *Godolphin.*

3. *Per* Lord *Hardwicke* Chan. It has never been laid down, that a common recovery is neceſſary to bar an eſtate tail in copyholds, and therefore I am of opinion, that an equitable eſtate tail in a copyhold will be barred by a ſurrender in the lord's court. 3 *Atk.* 815. 1754. *Radford* v. *Wilſon.*

4. An equitable intail cannot be barred by leaſe and releaſe. *Per* Lord *Hardwicke.* 1 *Veſ.* 260. 1749. *Kirkman* v. *Smith.*

5. By articles before marriage *Joſeph Hicks* covenants, that if he ſhould beget on his intended wife one or more ſons, he would ſettle lands of 200*l. per annum* to his wife for life for a jointure, and afterwards to truſtees to preſerve contingent remainders, for the ſon begotten on her body, and to the firſt ſon of ſuch firſt ſon, with remainders over, but with power to the huſband to receive the profits during his life. He left one ſon by the marriage, the preſent plaintiff; who was decreed an eſtate tail in the lands to be purchaſed. Even if the parties had deſigned an eſtate for life, it ought not to take effect; as in point of law, a ſon not in being cannot be conſidered to take a leſs intereſt than an eſtate tail, when he comes in being. 2 *Veſ.* 568. 1754. *Hucks* v. *Hucks.*

In the above caſe, a caſe was cited upon the will of the Duke of Marlborough, *the drawers of which did not attempt to make the ſons, who were to be born, tenants for life, but inſerted a power in the truſtees to reduce the eſtate tail to an eſtate for life, upon a tender to the truſtees by the tenant for life after he had a ſon; which was a long queſtion, how far that was good or not; and Ld. Cha. called in the aſſiſtance of the judges, and thought it was going a great way towards a perpetuity: but upon the death of the Ducheſs it was never determined.*

6. Chattels directed to go as heir looms with an eſtate, "*as far as the rules of law and equity will permit*," veſt in the firſt tenant in tail, who comes *in eſſe.* 3 *Bro. Ch. Rep.* 101. 1790. *Vaughan* v. *Burſlem.*

7. Deviſe of real eſtates of the anpual value of near 5000*l.*, and other eſtates directed to be purchaſed with the reſidue of the perſonal eſtate, amounting to above 600,000*l.*, to truſtees and their heirs, *&c.*, upon truſt, during the lives of the teſtator's ſons *A.*, *B.*, *C.*, and of his grandſon *D.*, and of ſuch other ſons as *A.*

now has or may have, and of ſuch iſſue as any other ſons of *A.* may have, and of ſuch ſons as *B.* and *C.* may have, and of ſuch iſſue as ſuch ſons may have as ſhall be living at his deceaſe, or born in due time afterwards, and during the life of the ſurvivor, to receive the rents and profits, and from time to time to inveſt the ſame, and the produce of timber, *&c.* in other purchaſes of real eſtates; and after the death of the ſurvivor of the ſaid ſeveral perſons, that the ſaid eſtates ſhall be divided into three lots, and that one lot ſhall be conveyed to the eldeſt male lineal deſcendant then living of *A.* in tail male, remainder to the ſecond, *&c.* and all and every other male lineal deſcendant or deſcendants then living who ſhall be incapable of taking as heir in tail male, or any of the perſons to whom a prior eſtate is limited of *A.* ſucceſſively in tail male, remainder in equal moieties to the eldeſt and every other male lineal deſcendant or deſcendants then living of *B.* and *C.* as tenants in common in tail male, in the ſame manner with croſs-remainders; or if but one ſuch male lineal deſcendant, to him in tail male, remainder to the truſtees, their heirs, *&c.* The other two lots were directed to be conveyed to the male deſcendants of *B.* and *C.* reſpectively, in the ſame manner and with ſimilar limitations to the male deſcendants of their brothers, and to the truſtees in fee; and it was directed that the truſtees ſhould ſtand ſeiſed upon the failure of male lineal deſcendants of *A.*, *B.*, and *C.* as aforeſaid, upon truſt to ſell and pay the produce to his Majeſty, his heirs and ſucceſſors, to the uſe of the Sinking Fund; the accumulation till the purchaſes or ſales can take place to go to the ſame purpoſe, with a direction that all the perſons becoming entitled ſhall uſe the ſurname of the teſtator only. The truſts of the will were eſtabliſhed. 4 *Veſ. jun.* 227, 1798. *Thelluſon* v. *Woodford.*

8. Lord *Loughborough*, in ſpeaking of the caſe of *North* and *Champernoon*, ſays, that it is very plain what Lord *Nottingham* meant, that for an equitable recovery there muſt be ſuch an intereſt as will be ſufficient for a recovery of a legal eſtate. He guards himſelf againſt the ſuppoſition that a mere eſtate tail in equity would be ſufficient to ſuffer a recovery upon to bar remainders, where there is a prior eſtate for life. He ſays, if there be a tenant for life, he muſt be a party; and there muſt be a tenant to the *præcipe:* if there is no eſtate for life, the tenant in tail alone is ſufficient. It had been diſputed before the time of Lord *Nottingham.* Probably the reaſon of the conteſt was what made the caſe of *North* and *Champernoon* of ſome importance. Prior to Lord *Nottingham's* time the queſtion occurred ſeveral times. Lord *Clarendon*, and the Maſter of the Rolls, and the Chief Juſtice held, that an equitable recovery barred all equitable remainders. Lord *Bridgman* doubted; he thought there could be no ſuch thing. The Chief Juſtice, the Maſter of the Rolls, and Lord *Clarendon* thought a deed would do. I do not know why that was not adhered to, but that it makes more profit to the conveyancers. Lord *Bridgman's* doubt made it come before Lord *Nottingham.*

He

He decided, that a recovery was quite ſufficient; and that there was no occaſion to have an application to the truſtees. *Per* Lord *Loughborough* Chan. 3 *Veſ. jun.* 276. *Burnaby* v. *Griffin.*

9. Covenant in a marriage ſettlement to ſettle leaſehold eſtates in truſt for ſuch perſons and ſuch or the like eſtates, ends intents and purpoſes as far as the law would allow, as declared concerning real eſtates limited to the firſt and other ſons in tail male, with ſeveral remainders. The court, in executing the covenant, declared, that no perſon ſhould be entitled to the abſolute property, unleſs he ſhould attain 21, or die under that age leaving iſſue male. 3 *Veſ. jun.* 387. 1797. *The Duke of Newcaſtle* v. *The Counteſs of Lincoln.*

(B. a) Truſtee, favoured or indemnified.

21 Vin. 520.

1. TWO perſons executors and truſtees under a will, would not prove the will, nor ſuffer the *ceſtui que truſt* to take out letters of adminiſtration *cum teſtamento annexo*, till he had executed a deed, by which he was to pay 100*l.* to one executor, and 200*l.* to the other, within ſix months after they ſhall have exhibited an inventory. Lord *Hardwicke* Ch. declared the deed was unduly obtained, and decreed that no allowance ſhould be made for the ſums of 100*l.* and 200*l.* to the plaintiffs, and ſaid that the court held a ſtrict hand over truſtees as to extraordinary allowances; though he admitted that there might be caſes, where the court would eſtabliſh an agreement made with a truſtee for an extraordinary allowance beyond the terms of the truſt. 2 *Atk.* 98. 1740. *Ayliffe* v. *Murray.*

2. Though there be a private agreement between a mortgagee and the mortgagor for an allowance for the mortgagee's trouble in receiving the rents and profits of the eſtate, yet the court will not carry it into execution, for he cannot be allowed more than his principal and intereſt. 2 *Atk.* 120. *Feb.* 1740. *French* v. *Baron.*

3. The receiver of Lord *Plymouth's* eſtate took bills in the country of perſons who were at that time in credit, in order to return the rents to *London*; the bills were proteſted, and the money loſt, yet the receiver held not liable. 3 *Atk.* 480. 1747. *Knight* v. *Lord Plymouth.*

4. Aſſignee of a bankrupt employs a broker to ſell a quantity of tobacco, the broker receives the money, and at the end of ten days fails, before he paid it over: the aſſignee is not bound to make it good. *Ambl.* 218. 1754. *Ex parte Belcher.*

5. If a truſtee appoints rents to be paid to a banker, at that time in credit, and the banker afterwards breaks, the truſtee is not anſwerable. *Ibid.*

6. Where an executor keeps the money of the teſtator in his hands without accounting for a long time, and employs it in his trade, he ſhall pay intereſt. 1 *Bro. Cha. Rep.* 359. 1784. *Newton* v. *Bennet.* See alſo *Perkins* v. *Baynton*, 1 *Bro. Cha. Rep.* 375.

Littlehales v. *Gascoyne*, 2 *Bro. Cha. Rep.* 73. and *Franklin* v. *Frith*, 3 *Bro. Cha. Rep.* 433. S. P.

7. A trustee in a will, which directed money to be lent at the best interest, by consent of his co-trustee, keps it at 4 *per cent.* he shall pay five. 2 *Bro. Cha. Rep.* 430. 1788. *Forbes* v. *Moss.*

8. An agent was to have no other emolument than his salary. He was decreed to account for profit made by a clandestine sale to his principal on his own account. 2 *Ves. jun.* 317. 1794. *Mossey* v. *Davies.*

9. Trustee not charged with a loss by the failure of the banker of the agent, in whose hands the money was deposited, pending a transaction for the change of a trustee. 6 *Ves. jun.* 226. 1801. *Adams* v. *Claxton.*

21 Vin. 521.

(D. a) Trustee. Accountable. How far.

1. A Trustee acting with notice of the will, receiving the profits and not renouncing, cannot say he acted as factor, but must account to the claimant under the will. 1 *Ves.* 522. 1750. *Conyngham* v. *Conyngham.*

2. Account decreed against a trustee, who having engaged the trust property in an adventure, afterwards renounced it for the trust, and declared it to be on his own account, though no part of the trust-money was actually laid out. 1 *Ves. jun.* 32. 1789. *Wilkinson* v. *Stafford.*

3. There is no general rule that a trustee to sell shall not be himself the purchasor; but he shall not thereby gain profit to himself: one of several trustees having purchased, and afterwards sold at a profit, was decreed to account for that profit with costs. 3 *Ves. jun.* 740. 1798. *Whichcote* v. *Lawrence.*

4. Trustee of stock sells it, the *cestui que trust* has an option to have the stock or the produce of it with interest: and in an action recently after the breach of an agreement to transfer stock, the rise, if any, would be given in damages. 4 *Ves. jun.* 497. *March* 1799. *Forrest* v. *Elwes.* *Vide* (B. a).

5. Bill to charge a trustee, as having, by delivering the title deeds to the tenant for life, enabled him to make a mortgage of a settled estate as tenant in fee, dismissed; the fraudulent purpose of enabling him to mortgage resting upon the evidence of a single witness, and being positively denied by the answer, as far as the allegations in the bill gave an opportunity of answering: but without costs, on the ground of negligence; and without prejudice to an action, and with an option to the plaintiffs to take an issue. 6 *Ves. jun.* 174. *Evans* v. *Bicknell.*

6. Trustees charged with a loss occasioned by their negligence, though without any corrupt motive. 6 *Ves. jun.* 488. 1801. *Caffrey* v. *Darby.*

(E. a) Accountable, where he ſubſtitutes an Attorney.

21 Vin. 524.

THOUGH a truſtee may appoint a bailiff, it ſeems he is reſponſible for his ſufficiency, unleſs the will or deed creating the truſt empower the appointment; in which caſe, the truſtee is only bound to ſee that his agent be a proper and ſolvent perſon at the time of appointment. 2 *Fonb.* 176. and the caſes there cited. See alſo (B. a).

(F. a) Breach of Truſt. What.

21 Vin. 525.

1. *A.* Being impropriator of a pariſh, demiſed part of the tithes to truſtees for 1000 years, who re-demiſed the ſame to him for 999 years, under a yearly rent of 50*l.* payable to the truſtees, as a proviſion for a preacher. *A.* afterwards ſold the rectory to *B.*, and the repreſentative of the ſurviving truſtee was prevailed upon to aſſign to *B.* the right of nominating the preacher. For 40 years and upwards, after this tranſaction, the preacher was conſtantly nominated by the pariſhioners; but upon a conteſt between them and *B.* it was held, that the right of nomination was abſolutely in the truſtees, and that the aſſignment of that right was a breach of truſt. 2 *Bro. P. C.* 368. 1721. *Foley* v. *Sir Robert Raymond.*

2. Truſtees may lend truſt-money upon a good perſonal ſecurity, till a proper purchaſe of lands can be had; but are not juſtified in placing it in any fluctuating or precarious public fund. 2 *Bro. P. C.* 577. 1724. *Emelie* v. *Emelie.*

3. Whatever a truſtee does to prevent the intention of the teſtator is a breach of truſt, and ought to be ſet aſide. *Com. Rep.* 423. 6 *Geo.* 2. *Attorney-General* v. *Young and others.*

4. Though generally ſpeaking an executor or truſtee compounding or releaſing a debt muſt anſwer for the ſame, yet if this appears to have been for the benefit of the truſt eſtate, it is an excuſe. 3 *P. Wms.* 381. 1735. *Blue* v. *Marſhall & Ux.*, 2 *Anſtr.* 363.

5. Where a truſtee of ſtock or annuities takes upon him to transfer, it is a breach of truſt, and the *ceſtui que truſt* in this court will be entitled to an election, either to have the individual ſtock or annuities reſtored to him, which ſtood in the name of the truſtee, or elſe to have the money it produced when it was ſold. 2 *Atk.* 121. *Feb.* 1740. *Harriſon* v. *Harriſon*; and 2 *Bro. Ch. Rep.* 653. *Boſtock* v. *Blakeney.*

6. Committee-men are agents to thoſe who employ them in the truſt to ſuperintend the affairs of the whole, and a groſs non-attendance in a committee-man may make him guilty of the breaches of truſt committed by others. 2 *Atk.* 405. *Aug.* 1742. *Charitable Corporation* v. *Sir R. Sutton.*

7. Where a ſupine negligence appeared in all the committee, by which a groſs loſs aroſe, they are all guilty, and a court of equity can lay hold of every breach of truſt, be it in a public or a private capacity. And though the committee might not be privy to the original fraud, yet they are guilty in the ſecond degree, by neglecting to uſe the power veſted in them, to prevent the ill conſequences ariſing from a confederacy. *Ibid.*

8. Counſel or agents are not to take a conveyance from the right heir for their own benefit, which they diſcovered by being truſtees. 3 *Atk.* 38. 1743. *Norris* v. *Le Neve.*

9. Where money was directed to be *inveſted, till a purchaſe of lands could be found, in government funds, or other good ſecurities;* laying out the money in *South-Sea* ſtock, or Bank ſtock, is not a good ſecurity, according to the terms of the truſt, as the directors may trade away their whole ſtock whilſt they keep within the terms of their charter, but *South-Sea* annuities and Bank annuities are *only* and properly good ſecurities; for the directors have nothing to do with the principal, and cannot bring any loſs upon them. 3 *Atk.* 445. *March* 1746. *Trafford* v. *Brehm.*

10. A truſtee cannot purchaſe lands deviſed to him in truſt for the payment of debts. 1 *Veſ.* 9. 1747. *Whelpdale* v. *Cookſon.*

11. Where truſtees join to deſtroy contingent remainders, it is a breach of truſt, and the alienee *with notice* of the truſt is affected. 1 *Veſ.* 556. 1750. *Garth* v. *Cotton*, 3 *Atk.* 751.

12. A truſt fund is created by will to be laid out in the purchaſe of lands: an eſtate is purchaſed, and the truſt-money is laid out in repairs and improvements; this is a miſapplication, and ſhall not be allowed. Part of this truſt-money was ſold juſt before a dividend was payable, and no allowance was made to the tenant for life, who would be entitled to the dividend in the price. 2 *Bro. Ch. Rep.* 653. 1789. *Boſtock* v. *Blakeney.*

13. The command of an *Eaſt-India* ſhip is a public truſt; and the ſale of it contrary to a public regulation of the company is a breach of public duty. 5 *Veſ. jun.* 181. 1800. *The Eaſt-India Company* v. *Neave.*

14. Money in the hands of a truſtee cannot be affected by a legal execution, nor can equity interfere. 2 *Anſtr.* 381. 34 *G.* 3. 3 Anſt. 433. *Cailland* v. *Eſtwick.*

21 Vin. 528.

(G. a) Breach of Truſt. Relieved as to Remainderman, or Reverſioner, &c.

1. THE court refuſed to order a truſtee to preſerve contingent remainders to join in ſuffering a common recovery, and diſmiſſed the bill brought by creditors againſt the heir at law and ſurviving truſtee, to join, but the court would not ſay that it would have been a breach of truſt in ſuch truſtee to have joined. 3 *Atk.* 22. 1743. *Woodhouſe* v. *Hoſkins.* See *Garth* v. *Cotton*, 1 *Veſ.* 556.

2 Where

2. Where a truſtee errs in the management of the truſt, and is guilty of a breach, yet if he goes out of the truſt with the approbation of the *ceſtui que truſt*, it muſt be made good firſt out of the eſtate of the perſon who conſented to it. 3 *Atk.* 444. 1746. *Trafford* v. *Boehm.*

(H. a) *Settlements decreed to be broke in upon. In what Caſes*, and Truſtees to join.

21 Vin. 529.

1. A Court of equity will not compel truſtees to join in a ſale, which will not only deſtroy contingent remainders, but all the uſes in a marriage ſettlement; for they are guilty of a breach of truſt, in joining to deſtroy contingent remainders, whether the ſettlement be voluntary, for a valuable conſideration, or by will. 1 *Atk.* 614. *Trin.* 1737. *Symance* v. *Tattam.*

2. The court refuſed to direct a truſtee to join in a recovery, but would not declare whether the truſtee's joining would have made him liable to make ſatisfaction for ſuch a breach of truſt. 3 *Atk.* 22. *Jan.* 1743. *Woodhouſe* v. *Hoſkins.*

3. A truſtee to preſerve contingent remainders not compelled to join in a recovery, unleſs to continue the eſtate, or under very particular circumſtances. 1 *Bro. Ch. Rep.* 534. 1781. *Barnard* v. *Large.*

4. Under the ſtat. 40 *Geo.* 3. *c.* 56. authorizing payment of money to be laid out in land, to be ſettled to the tenant in tail, the order was thus qualified, in caſe he ſhould be living on the 2d day of the enſuing term: and an inquiry as to incumbrances was directed. 6 *Veſ. jun.* 116. 1801. *Ex parte Bennet. Ex parte Dolman.*

5. But where the ſubject involved a doubtful queſtion, *viz.* the conſtruction of a truſt of an eſtate for lives, to permit two ſiſters to receive the rents for their lives, remainder to the heirs of their bodies; and in caſe they ſhould die without iſſue, from and after their deceaſes over; the court refuſed to make the order under the act. 6 *Veſ. jun.* 156. 1801. *Ex parte Sterne.*

6. A general rule, that a truſtee ſhall not of his own authority break in upon the capital of an infant's fortune. 6 *Veſ. jun.* 473. *Walker* v. *Wetherell.*

7. The court will not make an order under 40 *Geo.* 3. *c.* 56. authorizing the payment of money, in truſt to be laid out in land, to be ſettled to the tenant in tail, without a previous inquiry as to incumbrances. 6 *Veſ. jun.* 576. 1801. *Ex parte Hodges.*

21 Vin. 529. (I. a) Breach of Truſt. Truſtee bound in his own Eſtate. *How far.*

1. BY ſettlement before marriage it was agreed, that 2000*l.* in the hands of a truſtee ſhould be laid out in land, to the uſe of the huſband for life, then to the wife for life for her jointure, and to the children equally; and in caſe the huſband died without iſſue, to the wife in fee; and if he ſurvived, to him in fee. The huſband and wife being neceſſitous, the truſtee paid them 600*l.* on a releaſe, and their joint bond of indemnity, and afterwards 400*l.* more on the like bond, and a new agreement that the remaining 1000*l.* ſhould be laid out in the purchaſe of an annuity for the ſeparate uſe of the wife during the coverture, and in fee in caſe of ſurvivorſhip. The truſtee afterwards paid the huſband this 1000*l.* likewiſe: he is dead without iſſue, and left the wife deſtitute. Bill brought againſt the repreſentative of the truſtee for this breach of truſt in him, and to be paid what ſhould be due to the wife for the 2000*l.* out of his perſonal eſtate. In *March* 1738 the Maſter of the Rolls decreed that the wife ſhould be paid what ſhould be remaining due to her for the 2000*l.* and intereſt, out of the truſtee's perſonal eſtate, in a courſe of adminiſtration. On appeal to the Chancellor the caſe was compromiſed. 1 *Atk.* 615. 1738. *Thayer* v. *Gould.*

2. A breach of truſt is conſidered only as a ſimple contract debt, and can only fall on the perſonal eſtate of the truſtee. 2 *Atk.* 119. 1740. *Vernon* v. *Vawdry.*

3. If a huſband even after marriage conveys his wife's fortune to truſtees for her ſeparate uſe, and the truſtee is guilty of a breach of truſt, the court will oblige him to make ſatisfaction to the *ceſtui que truſt.* 2 *Atk.* 243. 1741. *Smith & Ux.* v. *Trench.*

4. In this caſe the Lord Chancellor *Hardwicke* ſtated it to be the rule of the court, That if a truſtee errs in the management of the truſt, and is guilty of a breach of it, yet if he goes out of the truſt with the approbation of the *ceſtui que truſt,* it muſt be made good out of the eſtate of the perſon who conſented to it. 3 *Atk.* 444. 1746. *Trafford* v. *Boehm.*

5. A truſtee for the ſale of eſtates for payment of debts, who purchaſed the eſtates himſelf by taking undue advantage of the confidence repoſed in him by the vendor, and previouſly to the completion of the purchaſe ſold them at a highly advanced price, decreed to be a truſtee for the original vendor, as to the ſums produced by the ſecond ſale. 2 *Bro. Ch. Rep.* 400. 1788. *Fox* v. *Macreth.*

6. Truſtees who joined with the remainder-man to *eject ceſtui que truſt* for life, muſt make good the whole rent reſerved, notwithſtanding ſubſequent accidental deficiencies. 1 *Veſ. jun.* 408. 1791. *Kaye* v. *Powel.*

(K. a) Breach of Truſt. Puniſhed. How far. 21 Vin. 530.

1. EXECUTORS, being in the nature of truſtees, ſhall be liable to coſts where they miſbehave themſelves in the execution of their truſt. 1 *Bro. Par. Caſ.* 115. 1705. *Sheppard* v. *Smith and others.*

2. A corporation are truſtees for a charity, and in poſſeſſion of the charity eſtate, but ſuppreſs or conceal ſome part of the evidence relating to the charity, they ſhall pay the coſts of the ſuit. 1 *Bro. Par. Caſ.* 399. 1713. *Mayor, Aldermen, and Commonalty of the Borough of Hertford* v. *The Poor of the ſame Borough.*

3. An executor intruſted with the diſpoſition of ſome church preferments, made a preſentation to *A.* under a ſecret condition for his own benefit: the preſentation was ſet aſide, and he was decreed to preſent a proper perſon, and to pay coſts. 5 *Bro. Par. Caſ.* 400. 1760. *Richardſon* v. *Chapman.*

4. Where an attorney or agent takes an undue advantage of the truſt repoſed in him, he ſhall be chargeable with intereſt of the money in hand. 6 *Bro. Par. Caſ.* 329. 1768. *Rochfort* v. *Earl of Ely.*

5. A truſtee is only anſwerable for fraud, or groſs neglect, which is equal to fraud: and therefore where truſt-money is ſuffered by a truſtee to remain in the hands of *A.*, with the privity and approbation of the parties beneficially intereſted, inſtead of laying it out in a purchaſe purſuant to marriage articles, and *A.* becomes inſolvent: the truſtee is not anſwerable. 7 *Bro. Par. Caſ.* 293. 1775. *Allen* v. *Hancom.*

6. A truſtee in a will which directed money to be lent at the beſt intereſt, by conſent of his co-truſtee keeps it at four *per cent.* He was ordered to pay 5*l. per cent.* 2 *Bro. Cha. Rep.* 430. *Dec.* 1788. *Forbes* v. *Moſs.*

7. When a truſtee ſells out ſtock improperly the *ceſtui que truſt* may elect whether he will have the ſtock replaced or the produce of it. 2 *Bro. Cha. Rep.* 653. 1789. *Boſtock* v. *Blakeney.*

8. A truſtee for miſconduct was ordered to pay coſts. 3 *Bro. Cha. Rep.* 236. 1791. *Dawſon* v. *Parrot.*

9. A truſtee miſtaking his power ſold ſtock without authority, he was decreed to replace it immediately; and if at a leſs price, to inveſt the ſurplus in the ſame ſtock to the ſame uſes. 1 *Veſ. jun.* 297. 1791. *Earl Pawlet* v. *Herbert.*

10. Truſtees joined with the remainder-man to put his mother, who was tenant for life of the eſtate under the truſt, out of poſſeſſion; and they went round together to the tenants, and deſired them not to pay her any more rent. The truſtees produced evidence of ſubſequent failures of tenants, *&c.* which occaſioned a deficiency of rent. It was referred to the Maſter to compute the loſs according to he leaſes exiſting at the time; and alſo to nquire in what manner the remainder-man interfered with the

truſtees in taking away the poſſeſſion from his mother during her life. 1 *Veſ. jun.* 408. 1791. *Kaye* v. *Powel.*

11. Executor and truſtee having been guilty of a breach of truſt by ſelling out ſtock and dealing improperly with the money, the *ceſtui que truſts* have an option to have the ſtock replaced, or the money produced by the ſales, with intereſt at 5*l. per cent.*, or more, if more hath been made of it, and alſo the coſts occaſioned by his miſconduct. 5 *Veſ. jun.* 794. 1801. *Pocock* v. *Reddington.*

12. Deviſees in truſt to ſell for payment of debts aſſign to the ſon of the deviſor, the creditors receive the intereſt from him for eleven years, and agree with him for an increaſe on their debts; the original truſtees are liable. 1 *Anſtr.* 110. *Mich.* 33 *G.* 3. *Hardwick* v. *Mynd.*

21 Vin. 532. (M. a) Truſtee. *Diſcharged or removed.* In what Caſes.

1. TRUSTEES were directed to be inhabitants of *B.*, an information was filed to remove them, becauſe they were not inhabitants of *B.*, and was diſmiſſed, there being no evidence to ſhew that there were proper perſons in *B.* to be truſtees. 1 *Bro. Cha. Rep.* 439. 1785. *Attorney-General* v. *Cowper.*

2. Teſtator directed a new truſtee to be appointed if either of his truſtees ſhould die, *or become incapable of acting*; one abſconded charged with forgery, but was not outlawed. It was referred to the Maſter to appoint a new truſtee. 2 *Veſ. jun.* 94. 1793. *Millard* v. *Eyre.*

3. A woman who had married a foreigner was decreed to be diſcharged from being a truſtee, notwithſtanding her anſwer denied any intention of quitting the kingdom, and ſtated her deſire of continuing in the truſt. 4 *Veſ. jun.* 592. *April* 1799. *Lake* v. *De Lambert.*

4. Bill by creditors againſt the executors and deviſees in truſt, ſubject to the payment of debts; all the eſtates were ſold under the decree. Motion for a reference to the Maſter to appoint a new truſtee in the room of *Oſborne*, and to ſettle the form of a releaſe, and diſcharge him from the truſt, on the ground that he had never acted or received any part of the purchaſe-money; and that he was of a very advanced age, which was directed; but the Maſter was to inquire whether he remained accountable for any acts done by him as truſtee. 6 *Veſ. jun.* 455. 1801. ——— v. *Oſborne.*

(N. a) *Co-Truſtee. Chargeable. How far for the Acts and Receipts of the other.*

1. WHERE property is depoſited in the hands of three perſons, and two of them go abroad out of the kingdom, the one remaining ſhall be anſwerable for the whole value. 4 *Bro. Par. Caſ.* 328. 1737. *Mackenzie* v. *The Marquis of Powis.*

2. Aſſignees of a bankrupt are mere truſtees, and each is ſeparately anſwerable only for what he receives. 1 *Atk.* 89. *Dec.* 1739. *Primroſe* v. *Bromley.*

3. If truſtees will bind themſelves to be liable for the acts of each other, the court will not relieve them. 3 *Atk.* 583. 1747. *Leigh* v. *Barry.*

4. Though there are not negative words in a deed that truſtees ſhall *not* be liable for one another's acts, yet the court will not make them ſo for more than caſh received. If they all join in a receipt the court will make that truſtee *only* liable who received it; otherwiſe as to executors, for they need not join. *Ibid.*

5. Bill to replace money raiſed by the ſale of the plaintiff's property in the funds by the truſtee, and for the appointment of new truſtees. The only queſtion was, whether *Ryme*, one of the truſtees in the deed, but who had never executed it, or formally accepted the truſt, was liable; *Moſman* the other truſtee, (brother to the plaintiff, a widow,) ſold the ſtock, but *Ryme* knew of it and concealed it from the plaintiff, and advanced her 500*l.* which ſhe ſaid ſhe borrowed rather than ſell out of the funds, (*Ryme* knowing that they were then ſold,) and the money came to the uſe of him and his partner, who had ſince failed, and the Chancellor held him equally liable with *Moſman.* 1 *Bro. Cha. Rep.* 68. 1779. *Boardman* v. *Moſman.*

6. A Truſtee joining in a receipt and re-conveyance of a mortgaged eſtate, though he does not receive the money, is liable, and the receipt being in evidence, no inquiry can be directed as to the fact. 3 *Bro. Cha. Rep.* 90. 1790. *Scurfield* v. *Howſe.*

7. One truſtee ſuffering the other to have truſt-money under a note of hand, held liable. 3 *Bro. Cha. Rep.* 112. *July* 1790. *Keble* v. *Thompſon.*

For more of *Truſt* in general ſee *Enfant, Executors, Fines, Guardian, Powers, Recovery Common, Settlements in Chancery, Uſes,* and other proper titles.

University.

22 Vin. 1.

(C) Privileges of the Universities.

THE university of *Oxford* claimed conusance under a grant (and act of parliament in confirmation thereof) of exclusive conusance of all causes where either the plaintiff or defendant is *a member of the university* wherever the cause of action may arise. The cause of action arose out of *Oxford*, and the defendant was a member of the university, but had left off residing there in general. The court held, that the grant could not be construed to extend beyond members usually resident in the university. *Hayes* v. *Long*, 2 *Wilf.* 310.

Uses.

22 Vin. 179.

(A. 3) Use. What it is, and the Antiquity and Original thereof.

1. AN use is an authority to take the profits *Com.* 243. *Trin.* 2 *G.* 1. *Dow* v. *Newborough.*

2. If a term of years be assigned to *A.* for the use of *B.* this shall be a trust for *B.* and not an use executed. *Com.* 271. 4 *G.* 1. *Saunders qui tam* v. *Stevens.*

One of the principal objects in passing the stat. of uses, was to restore in some measure the notoriety of the old common law conveyances; but their views in this respect were almost totally defeated by the introduction of conveyances by lease and release, and by the preservation of uses under the appellation of trusts; the legislature has at different times attempted to remedy the mischief arising from the secret transfer of property *to which conveyances by lease and release have given rise: among these attempts may be reckoned the stats. against fraudulent conveyances and devises.* 13 Eliz. c. 5. 27 Eliz. c. 4. *and* 3 Wm. & Mary c. 14. *but particularly the stat.* 29 Charles 2. c. 3. *commonly called the stat. of Frauds and Perjuries, and provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them otherwise than by writing. With the same views have been passed the acts for registering deeds respecting lands in the west and north ridings of the county of* York, *and in the county of* Middlesex, 2 & 3 Ann. c. 4. 6 Ann. c. 35. 7 Ann. c 20. *and* 8 G. 2. c. 6. *Upon a similar principle was passed the salutary and beneficial act of the 17th of his present Majesty*, c. 26. *for the registering the grants of life annuities. With respect to the last statute, it is to be wished, that the legislature would enable persons redeeming or repurchasing annuities granted by them, to enter an account of such redemption or repurchase upon the register; for as it is an impeachment of a person's credit that annuities of this nature should be recorded against him, it is but reasonable, that when he has redeemed or repurchased them, that should be as publicly known and ascertained as his grant of them; but for want of some regulations of this kind, persons lie under the imputation of being subject to the payment of annuities, after they are liberated from them. On the stat.* 29 Car. 2. c. 3. *the courts have decided, that as it was made with a design*

deſign to prevent, either in marriage or other treaties, uncertainty, perjury, and contrariety of evidence, the caſes not liable to theſe inconveniences are not within it. See 1 Eq Ca. Abr. 19. *The courts ſeem to have favoured a like equitable conſtruction of the ſtatutes for the regiſtration of deeds. Thus in the caſe of* Le Neve v. Le Neve, 1 Veſ. 64. *Ld.* Hardwicke *decreed, that if a deed reſpecting lands in any of the regiſter counties be not regiſtered, and afterwards the ſame lands are ſold or mortgaged, by a deed properly regiſtered, if the perſon claiming under the ſecond deed has notice of the firſt deed, the perſon claiming under the firſt deed, though it be not regiſtered, ſhall be preferred to him. The general doctrine of theſe deciſions is founded on principles both juſt and equitable, when applied to particular caſes; yet it may be doubted, whether a rigid adherence to the letter of theſe ſtatutes, particularly that of the* 29 Car. 2. c. 3. *would not have been more beneficial to the public.* Harg. Co. Lit 290. b. *note* 1.

3. Uſes were introduced during the conteſts between the Houſes of *York and Lancaſter* to avoid forfeitures, and were exactly the ſame with what truſts are now. 2 *Atk.* 150. 1740. *Lloyd* v. *Spillet.*

4. A deviſe to *A.* and ſuch uſes as he ſhall appoint, was good before the *ſtat. of uſes;* for when he appoints, the *ceſtui que uſe* is in by the feoffor and not by the appointer. 2 *Atk.* 567. 1743. *Cook* v. *Duckenfield.*

5. At law, before the ſtat. of uſes, every uſe was a truſt, then the ſtat. executed the legal eſtate, and joined it to the uſe, and therefore a truſt executed is now a legal eſtate; and to bring it to a truſt in equity, the legal eſtate muſt want to be executed by a conveyance. 2 *Atk.* 583. 1748. *Bagſhaw* v. *Spencer.*

6. Deviſe to truſtees to pay out of rents and profits (after deducting rates, taxes, and repairs) the reſidue to *C. S.*, and his aſſigns for life; and, after his deceaſe, to the uſe of the heirs male of the body of *C. S.*, *and in default of ſuch iſſue* remainder over, not an eſtate tail in *C. S.*, the uſe not being executed in him. 1 *Bro. Ch. Rep.* 74. 1780. *Shapland* v. *Smith.*

(G) Uſes at Common Law. In what Manner and Nature *Ceſtui que Uſe* ſhould have it, and how he might diſpoſe thereof. 22 Vin. 189.

1. USES at common law were, in moſt reſpects, what truſts are now. When a feoffment was made to uſes, the legal eſtate was in the feoffee, he filled the poſſeſſion, did the feudal duties, and was, in the eye of the law, the tenant of the fee. The perſon to whoſe uſe he was ſeiſed, called by the law writers the *ceſtui que uſe*, had the beneficial property in the lands; had a right to the profits, and a right to call upon the feoffee to convey the eſtate to him, and to defend it againſt ſtrangers. This right at firſt depended on the conſcience of the feoffee; if he withheld the profits from the *ceſtui que uſe*, or refuſed to convey the eſtate as he directed, the *ceſtui que uſe* was without remedy. To remedy this grievance, the writ of *ſubpœna* was deviſed, or rather adopted from the common law courts, by the court of Chancery, to oblige the feoffee to attend in court and diſcloſe his truſt, and then the court compelled him to execute it. Thus uſes were eſtabliſhed. They were not conſidered as iſſuing out of, or annexed to the land as a rent, a condition, or a right of common; but

but as a truſt repoſed in the feoffee, that he ſhould diſpoſe of the lands at the diſcretion of the *ceſtui que uſe*, permit him to receive the rents, and in all other reſpects have the beneficial property of the lands; yet an uſe, though conſidered to be neither iſſuing out of, or annexed to the land, was conſidered to be collateral to it, or rather as collateral to the poſſeſſion of the feoffees in it, and of thoſe claiming that poſſeſſion under them. Hence the diſſeiſor, abator, or intruder of the feoffee, or the tenant in dower, or by the curteſy of a feoffee, or the lord entering into poſſeſſion by eſcheat, were not ſeiſed to a uſe, though the eſtates in their hands were ſubject to rents, common, and conditions. They were conſidered as coming in by a paramount title; or, as it is called in the law, *in the poſt*, in contradiſtinction from thoſe who, claiming under the feoffee, were ſaid to be *in the per*. Thus between the feoffee and the *ceſtui que uſe*, there was a confidence in the perſon, and privity in eſtate; (ſee *Chudleigh* caſe, 1 *Rep.* 120., and *Burgeſs* and *Wheat*, 1 *Black.* 123.) but this was only between the feoffee and *ceſtui que uſe*. To all other perſons the feoffee was as much the real owner of the fee, as if he did not hold it to the uſe of another. He performed the feudal duties; his wife was entitled to dower; his infant was in wardſhip to the lord; and upon his attainder, the eſtate was forfeited. To remedy theſe inconveniences, the ſtat. of 27 *H.* 8. was paſſed, by which the poſſeſſion was diveſted out of the perſons ſeiſed to the uſe, and transferred to the *ceſtui que uſe*. For by that ſtat. it is enacted, that when any perſon ſhall be ſeiſed of any lands to the *uſe, confidence or truſt*, of any other perſon or perſons, by reaſon of any bargain, ſale, feoffment, fine, recovery, contract, agreement, will, or otherwiſe; then and in every ſuch caſe the perſons having the uſe, confidence or truſt, ſhould from thenceforth be deemed and adjudged in lawful ſeiſin, eſtate and poſſeſſion of and in the lands, in the ſame quality, manner and form, as they had before in the uſe. There ſeems to be little doubt, but that the intention of the legiſlature in paſſing this act, was utterly to annihilate the exiſtence of uſes, conſidered as diſtinct from the poſſeſſion; but they have been preſerved under the appellation of *truſts*. The courts heſitated much before they allowed them under this new name. On the one hand, it had clearly been the intention of the legiſlature to deſtroy them, while they continued uſes at the common law: on the other hand, motives of equity, or rather of compaſſion, and the general bent of the nation pleaded ſtrongly in their favour. The latter prevailed. Thus (to uſe the expreſſion of Lord *Hardwicke*, 1 *Atk.* 591.) a ſtatute made upon great conſideration, and introduced in a ſolemn and pompous manner, has had no other effect, than to add, at moſt three words to a conveyance. Beſides this; one of the chief inconveniences produced by truſts, was, the ſecret method they afforded for the transfer of property. The ſtatute intended to reſtore the notoriety of the old common law conveyances, ſo far from effecting it, the exiſtence and transfer of fiduciary, or truſt eſtates has continued. Secret modes of

transferring

transferring the poſſeſſion have been diſcovered, and have totally ſuperſeded the notorious and public mode of transferring property, which the common law required, and the *ſtatute* intended to to reſtore; and many modifications of real property have been allowed, which the common law did not admit. *Harg. & Butl. Co. Lit.* 271. *b. note* 1.

2. As to the nature of the eſtates of feoffee and *ceſtui que uſe*, ſince the ſtat. of uſes; as to the limitations and modifications of landed property unknown to the common law, which have been introduced under the ſtatute of uſes; as to the mode by which conveyances to uſes operate; as to the doctrine of powers deriving their effect from the *ſtat.* of uſes; and as to uſes not executed by the *ſtatute; vide Harg. & Butl. Co. Lit.* 271. *b. note* 1.

(O. 6) Conſideration. Averment. [And of what Things the Uſe ſhall be.] 22 Vin. 215.

AT common law the uſe was intended to be in the feoffee or conuſee, and is not averred, as it muſt be, if to the uſe of the feoffor, *&c.* 3 *Veſ. jun.* 666. 1798. *Cave* v. *Holford.*

(T. 2) What ſhall be ſaid a Direction of Uſes of a Fine or Recovery. 22 Vin. 234.

1. THE father tenant for life, remainder to the ſon in tail, with remainder over. The ſon is an infant, and on an advantageous propoſal for the ſon's marriage, the father and infant ſon join in marriage articles; and the father *only* covenants, that within a year after the ſon's coming of age, the father and ſon will join in a fine and recovery of the family eſtate to divers uſes, the infant ſon ſeals the deed, and within a year after he comes of age, joins with the father in a fine and recovery. The infant ſon's ſealing theſe articles is not ſufficient to declare the uſes of the fine and recovery. 3 *P. Wms.* 206. 1733. *Nightingale and others* v. *Ferrers.*

2. Where the uſe of the recovery is declared to be to the recoveror and his heirs, it does not create a new eſtate, but he is in of the ancient uſe. 3 *Atk.* 756. 1753. *Garth* v. *Cotton.*

(T. 6) Declaration of Uſes of a Fine or Recovery, being made by ſome of the Parties only. 22 Vin. 236.

WHERE there is a deed to lead the uſes of a recovery, it is not in the power of tenant in tail to declare new uſes; but ſuch ſubſequent declaration muſt be by all parties concerned in intereſt. 1 *Atk.* 7. 1739. *Stapillton* v. *Stapillton.*

22 Vin. 237. (X) Uſes. *Relation.* From what Time the Uſe ſhall be ſaid to ariſe.

WHERE there is an agreement to ſuffer a recovery, and uſes are declared, though it be ſuffered at a different time from the recovery covenanted to be ſuffered, yet if no ſubſequent declaration of uſes, it will enure to the uſes ſo declared. 1 *Atk.* 7. 1739. *Stapillton* v. *Stapillton.*

22 Vin 239. (B. a) Uſes raiſed by an improper Conveyance, being conſtrued as a proper Conveyance.

1. G. *S.* being ſeiſed in fee of lands, in conſideration of a marriage to be had between him and *A. S.*, by indenture between himſelf on the one part, and the ſaid *A. S.* and *W. S.* on the other part, gives, grants, enfeoffs, aliens, and confirms to *A. S.* and *W. S.* and their aſſigns, lands then in his own poſſeſſion, *habendum* to the uſe of the ſaid *A. S.* for life, remainder to the heirs of her body begotten by the ſaid *G. S.*, who covenants that the lands ſhould remain to the ſaid uſes: this is a covenant to ſtand ſeiſed to uſes. 2 *Wilſ.* 22. 1755. *Doe* v. *Simpſon.*

2. Deeds in conſideration of love and affection good without livery as a covenant to ſtand ſeiſed. 2 *Veſ.* 256. 1751. *Rigden* v. *Vallier.* 2 *Atk.* 149. S. P.

Deeds to uſes not conſtrued with greater latitude than common law conveyances, as to words of limitation, otherwiſe of words of modification of the eſtate. Ibid.

3. Feoffment by deed to a relation and his heirs, but no livery of ſeiſin, conſtrued a covenant to ſtand ſeiſed. 2 *Veſ. jun.* 226. 793. *Habergham* v. *Vincent.*

22 Vin. 251. (I. a) Limited *in futuro.*

SIR *W. D.* by his will deviſed all his eſtates purchaſed or to be purchaſed to *M. D.* his daughter for life, with remainder to truſtees to preſerve, *&c.*, remainder to the firſt ſon in tail male, and to the ſecond, *&c.* in tail general: and in default of ſuch iſſue, remainder to the daughters, *&c.*; and if *M. D.* died without iſſue, remainder to Sir *H. N.* in tail, with ſeveral remainders over. *M. D.* after 21 marries, and ſubſequent to it executes a deed, by which ſhe conveys the reverſion in fee of the lands purchaſed expectant on the ſeveral remainders under the will to *G. B.* and his heirs in truſt for ſeveral uſes and covenants, to levy a fine *ſur conceſſit* to the uſes of the deed, and recites the limitations under the will in the order mentioned; then with a proviſo that the uſes declared by the deed ſhall not take place *till after all* the limitations

limitations under the will, and *a fine levied accordingly*. It was inſiſted *M. D.* had by the fine forfeited her eſtate for life; but the court held, that it was only a fine of the reverſion, as the deed expreſsly recites all the intervening eſtates for life under the will, and limits uſes after all theſe. 3 *Atk.* 728. 1750. *Lethieulier* v. *Tracey*.

(M. a) Uſes upon Uſes. 22 Vin. 254.

NO uſe can be limited upon a uſe. *Comm.* 243. *Trin.* 2 *Geo.* 1. *Daw* v. *Newborough*.

(N. a) Springing Uſes. What are, and good. 22 Vin. 254.

1. IF baron ſeiſed in fee of lands in *A.*, and feme ſeized in fee of lands in *C.*, before marriage, ſettle the whole to the baron for life, remainder to the feme for life, remainder to the children of the marriage, for ſuch eſtates, *&c.* as the feme ſhall appoint; and for want of ſuch appointment, to the children equally, and their heirs as tenants in common; and for want of ſuch iſſue, to ſuch perſons and uſes as the feme ſhall appoint; and for want of ſuch appointment as to the lands in *C.* to the heirs of the *feme*, and as to the lands in *A.* to the heirs of the baron; if the baron die, leaving one ſon only, and the feme appoint the whole to him by her will: but if he die under age and without iſſue, the whole to ſtrangers: then if the ſon die under age and without iſſue, this is a good appointment; or if it be not, it is a good executory deviſe of the feme's reſulting uſe in the lands in *C.*; but if the appointment be bad, the heir on the part of the baron has title. 1 *Wilſ.* 270. 1750. *Thruſtout* v. *Denny and others*, *C. B.*

2. *A.* by will deviſed to truſtees to the uſe of *B.* for life, remainder to truſtees, *&c.*, remainder to the firſt and other ſons of *B.*, remainder to the daughters of *B.*, remainder to the uſe of ſuch perſon as he ſhould appoint by deed; and afterwards by a deed (in which he recited the will) he appointed the ſame premiſes "after the death of *B.*, and failure of her iſſue, to the uſe of the firſt and other ſons of *C.*," *&c.* *B.* afterwards died without iſſue. Holden, that the limitations created by the will and the deed could not be united, and that the limitation in the latter to the firſt and other ſons of *C.*, *&c.* was too remote to take effect, being after a general failure of iſſue of *B.* 5 *Term Rep.* 92. 1792. *Habergham* v. *Vincent*.

3. By deed and fine an eſtate was limited to the uſe of the huſband for life, remainder to truſtees and their heirs during his life to preſerve contingent remainders; remainder to the wife for life, remainder to the truſtees and their heirs (not ſaying "during her life,") in truſt to ſupport contingent uſes and eſtates thereinafter limited, remainder to the firſt and other ſons in tail, remainder

mainder to the wife in tail, remainder, in default of iſſue, to ſuch perſons and for ſuch eſtates as ſhe ſhould appoint, &c. It was held that the truſtees took a legal eſtate in fee after the determination of the wife's life eſtate, and that all the ſubſequent limitations were truſt-eſtates. it was alſo holden, that an appointment by the wife to the uſe of the right heirs of the huſband could not unite with the antecedent life eſtate of the huſband, but could give only an equitable eſtate to the perſon, who at his death ſhould anſwer the deſcription of his right heir. 7 *Term Rep. B. R.* 342. *Trin.* 37 *G.* 3. *Venables* v. *Morris. Ib.* 438.

4. Where after a deviſe to one for life the deviſor limited the eſtate to truſtees *and their heirs* in truſt to preſerve contingent remainders, and to permit the tenant for life to take the profits, with remainder over on his deceaſe; and he afterwards gave other eſtates for lives, with ſeveral remainders over; and after each eſtate for life he interpoſed the ſame eſtates to truſtees and their heirs: it was holden, that this ſhewed his intent to be that the eſtates to the truſtees ſhould be confined to the lives of the ſeveral tenants for life, and conſequently that thoſe in remainder took legal eſtates, there being no other circumſtances in the will to ſhew a contrary intent. 7 *Term Rep.* 433. *B. R.* 38 *Geo.* 3. *Doe* v. *Hicks.*

5. There may be any number of ſpringing uſes within 21 years after lives in being. 2 *Veſ. jun.* 241.

6. Contingent uſes, ſpringing uſes, executory deviſes, &c. were foreign to the notions of the common law, but were let in by conſtruction, (by judges themſelves) upon uſes, after they became legal eſtates. 1 *Atk.* 591. 1738. *Hopkins* v. *Dare.*

22 Vin. 263. (T. a) Determined. When the Uſes ſhall be ſaid to be determined in reſpect of the Words of the Limitation.

THE deciſions, that, where the uſes to convert perſonal into lands are united with the funds in the ſame perſon, it ſhall be conſidered as land, without intent declared to the contrary have gone too far; for in that caſe the uſes are merged, there being no perſon to call for the application. 2 *Veſ. jun.* 204. 1790. *Raſbey* v. *Maſters.*

22 Vin. 268. (X. a) Stat. 27 *H.* 8. *cap.* 10. and what is executed thereby.

1. THE ſtat. of uſes was made to execute, and bring the eſtate to the uſe; and after the ſtat. the *ceſtui que uſe* was ſeiſed of the eſtate at law, as before he was of the uſe in equity, but the neceſſities of mankind have obliged the judges to give way to uſes notwithſtanding. 1 *Atk.* 591. 1738. *Dare* v. *Hopkins.*

2. Under a deviſe of lands to truſtees in fee in truſt for *A.* (an infant) for 99 years if he ſhould ſo long live, and after that term to his firſt, ſecond, third, and fourth ſons, and the iſſue male of their bodies for the like term of 99 years, as they ſhall be in ſeniority of birth; and in default of ſuch iſſue male in him or them, then to *B.* and the iſſue male of his body, for the like term of 99 years; and in default of ſuch iſſue male, then to the right heirs of the deviſor; *A.* takes an eſtate for 99 years, determinable with his life, and upon his death his firſt ſon takes a like eſtate; but the ſubſequent limitations to his other ſons and to *B.* are void, not being limitations of uſes executed by the ſtat. 6 *Term Rep. B. R.* 213. 35 *G.* 3. *Somerville* v. *Lethbridge.*

3. A deviſe of lands to truſtees and their heirs upon truſt to permit a *feme covert* to receive and take the rents and profits during her life for her ſole and ſeparate uſe, and after her deceaſe to the uſe of the firſt and other ſons of her body, then to the daughters as tenants in common, with other like limitations to other *feme coverts*, veſts the legal eſtate by way of uſe executed in fee ſimple in the truſtees. *B. R.* 7 *Term Rep.* 652. 38 *G.* 3. *Harton* v. *Harton.*

(Y. a) Reſulting Uſes.

22 Vin. 278.

1. *A.* By marriage articles covenanted, that all the lands which he ſhould afterwards purchaſe in the pariſh of *K.* ſhould be to the uſes of the articles. He purchaſed lands in *K.* and took a conveyance in fee in the name of his youngeſt ſon, but there was no declaration of truſt. Held, that the ſon was a truſtee for his eldeſt brother, who was entitled to theſe lands by virtue of the covenant. 2 *Bro. Par. Caſ.* 350. 1721. *Blake* v. *Blake.*

2. *C.* lends money upon the mortgage of a copyhold eſtate; but being infirm and unable to travel, the ſurrender, *&c.* is taken in name of *D.* the ſon-in-law, who executes a declaration of truſt. *C.* afterwards purchaſes the equity of redemption, and the ſecond ſurrender is, for the ſame reaſon, taken in the name of *D.*, but no declaration of truſt is made on occaſion of this purchaſe. Held that the heir of *D.* was a truſtee for the heir of *C.*, and that having expreſsly declared the truſt of the firſt ſurrender, there was no neceſſity for a new declaration of truſt, as to the equity of redemption. 4 *Bro. Par. Caſ.* 67. 1732. *Acherley* v. *Acherley.*

3. Eſtate deviſed to a body corporate (which cannot take by the ſtat. of mortmain,) in truſt, the uſes are not defeated by the deficiency of the truſtee, but attach upon the eſtate the law raiſes, and the heir at law becomes a truſtee to the uſes of the will. 1 *Bro. Cha. Rep.* 81. 1780. *Sonley* v. *The Clock Makers' Company.*

22 Vin. 288.

(G. B) Equity.

1. *PHILLIP STAPLETON*, tenant of the premiſes in queſtion for 99 years, if he ſo long lived, remainder to his firſt and other ſons in tail, remainder to his right heirs; having two ſons *Henry* and *Phillip*, they by leaſe and releaſe of the 9th and 10th of *September* 1724, in order to ſettle and perpetuate the manors, *&c.* in the name and blood of the *Stapletons*, and for making proviſion for his ſons, and for preventing diſputes, which might poſſibly ariſe between them or any other perſon claiming an intereſt in the eſtates, and for barring all eſtates tail, releaſe and confirm to two truſtees all thoſe manors, *&c.* to hold to them and their heirs, as to part, to the uſe of *Phillip* the father, his heirs and aſſigns for ever, (and as to another part,) to the uſe of the father for life, to *Henry* the ſon for life, remainder to truſtees to preſerve, *&c.* remainder to his firſt and other ſons in tail male, remainder to *Phillip* the ſon for life, with like remainders to the daughters of *Henry* in tail, remainder to the daughters of *Phillip* the ſon in tail, remainder to the right heirs of *Phillip* the father; and as to the other part to the uſe of *Phillip* the father for life, remainder to *Phillip* the ſon for life, *&c.* By leaſe and releaſe 28 and 29 of *September* 1724, the father and two ſons make *Thompſon* and *Fairfax* tenants to the *præcipe*, in order to ſuffer a recovery for the purpoſes mentioned in the former deed. Before any recovery ſuffered *Henry* died, leaving iſſue the plaintiff. Afterwards by leaſe and releaſe 12th and 13th of *April* 1735, *Phillip* the father and *Phillip* the ſon covenant to ſuffer a recovery, in which *Thompſon* and *Fairfax* were to be tenants to the *præcipe*, to the uſe, as to part, of *Phillip* the father and his heirs; and as to the other part, to the uſe of *Phillip* the father for life, remainder to *Phillip* the ſon in fee. In *Trin.* term 1725 a recovery was ſuffered, in which were the ſame tenants to the *præcipe*, the ſame demandants, and the ſame vouchees, (except *Henry*, who was dead,) as were covenanted by the firſt deed, and within twelve months after this deed. The father being dead, the plaintiff as ſon and heir of *Henry*, brought his bill to eſtabliſh his title to the premiſes in queſtion, and for the whole eſtate as tenant in tail under an old ſettlement. The defendant *Phillip* the ſon inſiſted that *Henry* was a baſtard, and that by the deed of 1725, and the recovery, he was intitled to the whole eſtate. Upon an iſſue *Henry* was found illegitimate; and the cauſe coming to be heard on the equity reſerved, the court declared, that the plaintiff was intitled to the lands limited in remainder to his father by the deeds of 9th and 10th *September* 1724, according to the uſes therein, notwithſtanding the illegitimacy of his father, a court of equity being deſirous of laying hold of any juſt grounds to carry agreements into execution made to eſtabliſh the peace of a family. 1 *Atk.* 2. 1739. *Stapleton* v. *Stapleton.*

2. Courts

2. Courts of equity have given the ſame power to *ceſtui que truſts* as to alienation, as if it were an uſe executed. 1 *Atk.* 591. 1738. *Hopkins* v. *Dare.*

For more of *Uſes* in general ſee *Bargain* and *Sale, Covenant, Eſtate, Fines, Grants, Recovery Common, Remainder, Remitter, Truſt, Voucher,* and other proper titles.

Uſury.

(C) What ſhall be ſaid Uſury.

12 Vin.

1. AN annuity for the life of the vendor, aged 32 years, was ſold at ſix years purchaſe, redeemable at the option of the vendor at the end of five years, for five years and a half's purchaſe. There was never any treaty or agreement for a loan, but by miſtake of the ſcrivener it was ſtiled as a loan in the deeds. Held not uſury; for in an uſurious contract there muſt be a loan, and where the principal is ever *bonâ fide* in hazard, there is no loan. *Murray* v. *Harding,* 2 *Black. Rep.* 859.

2. *A.* aged 30 years borrowed 5000*l.* to pay 10,000*l.* upon the death of *B.*, aged 78 years, if he ſhould ſurvive her. Held not to be uſury, becauſe of the *bonâ fide* hazard run. *Earl of Cheſterfield* v. *Janſen, Knt.* 1 *Wilſ.* 287. S. C. 2 *Veſ.* 125.

3. The defendant indorſed a note for 200*l.* to the plaintiff, having then three months to run, and received 197*l.*; on its becoming due the plaintiff took another note from him for it for 200*l.* on advancing other 3*l.* *Lee* Ch. J. thought this uſury, but left it to the jury whether to conſider it as a loan or as a purchaſe, who found the former, and the defendant had a verdict. *Maſſa* v. *Dawling,* 2 *Stra.* 1243.

4. Where 200*l.* was lent on condition to pay the principal, and 20*l.* in a year, *or* 25*l.* a-year for the life of the borrower, it was held not to be an uſurious contract. *Wortley* v. *Pitt,* 1 *Veſ.* 164.

5. One agreed to lend 1000*l.* at 5 *per cent.*, and for that purpoſe ſold 1000*l. South-Sea* annuities, which being under *par* produced leſs than 1000*l.* by 76*l.*; a mortgage was taken for the whole 1000*l.* This was held a ſhift within the ſtatute of uſury, and the difference was decreed to be repaid, on a bill brought after a decree of foreclоſure, and the whole money allowed by the maſter on the account under that decree. *Moore* v. *Battie, Ambl.* 371.

6. Action on this note: "In conſideration of two guineas received, I promiſe to pay *A. B.* 20 guineas on the deceaſe of my "preſent

"preſent wife." The wife was 70 years of age. Held not to be uſury, for it is a real wager, however fooliſh, and not a loan diſguiſed under that ſhape. *Lamegs* v. *Gould*, 2 *Burr.* 715.

7. *A* lent *B.* 100*l.* for four years without intereſt, in conſideration that *B.* ſhould provide meat and drink for *A.*'s daughter *C.*, who was to be partner with *B.*'s wife as a milliner, have half the profits, and bear half the loſs; and to lodge *A.* for 10*l. per ann.* The defendant pleaded that the bond was uſurious, with an averment that the board of the mother and daughter were worth 30*l. per ann.* The court held the plea bad, as the whole bargain might be beneficial to *B.* from the ſkill of *C.* or other cauſes. *Moriſſet* v. *King*, 2 *Burr.* 891.

8. One ſold goods at three months credit; but ſtipulated in caſe the money ſhould be unpaid, that the vendee ſhould allow him an halfpenny an ounce *per* month, till the diſcharge of the debt; this allowance was above the legal rate of intereſt, but according to the uſage in that trade; and being a *bonâ fide* ſale, and not a diſguiſed loan, was held not to be uſurious. *Floyer* v. *Edwards*, *Cowp.* 112.

9. If the plaintiff declare upon the ſtatute of uſury, he muſt prove the contract as laid; and if he ſtates it to be for a forbearance for one year, and it is proved to be for a forbearance for two years, although that alſo would be uſurious, he cannot recover. *Carliſle* v. *Trears*, *Cowp.* 671.

10. The defendant agreed with one *Highway* to lend him 600*l.*, and advanced 200*l.* accordingly; but when preſſed for the reſt, he took advantage of *Highway*'s neceſſity to extort an annuity to himſelf (under a feigned name,) at very exorbitant terms; promiſing in three months to furniſh him with money to redeem from the ſuppoſed grantee. This was held uſury; for where the contingency (during the three months) was ſo ſlight as to be merely an evaſion, it is to be deemed colourable, and not ſufficient to take it out of the ſtatute. *Richards qui tam* v. *Brown*, *Cowp.* 770.

11. Upon a negotiation for a loan of money, the lender ſays he cannot advance caſh, but will furniſh goods, which the borrower takes and ſells by the intervention of a perſon recommended by the lender: ſecurity is given, payable at a future day, for a ſum exceeding the value of the goods, and 5 *per cent.* intereſt. This was held an uſurious loan, and the ſecurity void. *Lowe* v. *Waller*, *Dougl.* 736.

12. A bill payable in *India* was indorſed in *England* for the current price, which then was 6*s.* 6*d. per* pagoda: it being returned, the plaintiff recovered on a writ of inquiry, at the rate of 10*s. per* pagoda, (that being the general charge, including *Indian* intereſt, exchange, and other charges,) and alſo 5 *per cent.* from the time of notice of nonpayment: and the court held the damages right. *Auriol* v. *Thomas*, 2 *Term Rep.* 52.

13. 14 *Geo.* 3. *c.* 79. All mortgages and ſecurities which by any of his Majeſty's ſubjects have been or ſhall be made in *Great Britain*

tain of or concerning any lands, ſlaves, cattle, or other things lying in *Ireland*, or in any of the *Britiſh* colonies or dominions for ſecuring re-payment of money *bonâ fide* lent thereon, and all bonds and ſecurities for payment of the ſame ſums of money, ſhall be as good and valid as if made in the kingdom, colony, or place where the ſaid lands, *&c.* lie; and none of his Majeſty's ſubjects ſhall be liable to any penalty or forfeiture by receiving intereſt for the ſums ſo advanced at the rate of intereſt allowed and eſtabliſhed by the laws of the place wherein the ſaid premiſes lie.

14. *Sect.* 3. Provided always, that this act ſhall not make good any ſuch mortgage or ſecurity where the lender has knowingly advanced more money thereon than the premiſes, *&c.* are *bonâ fide* worth.

15. *Sect.* 4. Provided alſo, that ſuch mortgages and ſecurities ſhall be regiſtered according to the manner and within the time preſcribed by the laws of the kingdom or place where ſuch premiſes, *&c.* lie.

16. *A.* contracted with *B.* for the ſale of an eſtate in the *Weſt Indies*, and it was agreed that part of the purchaſe-money ſhould remain ſecured by the bond of *B.* and *C.* That bond was afterwards cancelled, and another executed in *England* by *B.* and *D.*, reſerving *6 per cent.* intereſt, in the ſame manner as the former. This was held to be uſurious; for the ſtatute means not to extend to perſonal contracts. *Dewar* v. *Span*, 3 *Term Rep.* 425.

17. A loan of money produced by the ſale of ſtock, on an agreement that the borrower ſhall replace the ſtock on a certain day, *or* repay the money on a ſubſequent day, with ſuch intereſt in the mean time as the ſtock itſelf would have produced, was held not to be uſurious, although the intereſt exceeded 5 *per cent.*, it not appearing that it was meant as a colour for uſury. Whether a tranſaction is meant as a cloak for uſury or not, is a matter for the conſideration of the jury, and their finding is concluſive. *Tate* v. *Willings*, 3 *Term Rep.* 531.

18. The borrower of money gave a bond for the principal and intereſt at 5 *per cent.*, and covenanted at the ſame time alſo to pay to the lender a certain portion of the profits of the borrower's trade; it was argued that the principal was in danger, becauſe the lender was liable thereby to all creditors for the debts incurred in the trade; but the court held that to be only the common hazard, the inſolvency of the borrower, and therefore the contract was uſurious. *Morne* v. *Wilſon*, 4 *Term Rep.* 353.

19. A bond was conditioned for the payment of 100*l.* by quarterly payments of 5*l.* each, and intereſt at 5*l. per cent.*, and a memorandum was endorſed thereon, "That at the end of each year "the year's intereſt *due* was to be added to the principal, and "*then* the 20*l.* received in the courſe of the year was to be de-"ducted, and the balance to remain as principal." This was held not to be an uſurious contract; for the word *due*, means *legally due*. Lord *Kenyon* Ch. J. *contrà*. *Le Grange* v. *Hamilton*, 4 *Term Rep.* 613.——*N. B.* This judgment was affirmed in the Exchequer-Chamber.

(I) Forfeiture or Avoidance of the Security. In what Cases.

1. WHERE a bond and judgment had been given, and a *scire facias* sued out thereon by the assignees of the obligee, the court held that the defendant could not plead that the contract was usurious; for a judgment is not a *security* within the meaning of the statute 12 *Anne*; and the only way to be relieved at law is by motion to set aside the judgment. *Bush and others, Assignees of Jones*, v. *Gower*, 2 *Stra.* 1043. *B. R. Hil.* 233.

2. A bill of exchange was given upon an usurious consideration, and afterwards coming into the hands of an indorsee for valuable consideration without notice of the usury, was nevertheless held void. *Lowe* v. *Waller*, *Dougl.* 736.

3. Upon trover for goods pawned upon an usurious contract, the court held that the plaintiff could not recover without shewing a tender of all money really due. *Fitzroy* v. *Gwillim*, 1 *Term Rep.* 153.

(I) Forfeiture of treble Value. In what Cases.

1. ONE lent 100*l.*, and took by way of advance 6*l.* 5*s.* for the interest thereof for three months next following. A case reserved stated these facts, and that the action was not commenced till more than a year had expired after the lending and taking the interest by advance: and for this the court gave judgment for the defendant, holding the usury to have been complete, and the penalty incurred immediately on receiving the 6*l.* 5*s.* *Lloyd qui tam* v. *Williams*, 3 *Wilf.* 250. and 2 *Black. Rep.* 792.

2. A sum of money was lent upon an agreement to pay legal interest, and a premium over and above was paid when the money was advanced. The court held, that as that premium was not itself alone the legal interest, although the security was void immediately, yet the penalty was not incurred till more than legal interest was actually received; and therefore an action within a year after the payment of the first half year's interest was in time. *Fisher qui tam* v. *Beasley*, *Dougl.* 235.

22 Vin. 314.

(Q) Relief, in what Cases.

1. BOTTOMREE bonds are not usurious; and where the contract is for hazard and not for forbearance, it is not usurious. In this case in *May* 1738, the defendant paid 5000*l.* to *Spencer*, and the same day took a bond from him in the penalty of 20,000*l.* conditioned to pay 10,000*l.* to the defendant at or within some short time after the Duchess of *Marlborough*'s death in case he

ſhould ſurvive her, not otherwiſe: this was held not to be uſurious. 1 *Atk.* 301. 1750. *Cheſterfield* v. *Janſen.* 2 *Veſ.* 142. S. C.

2. In a bill to ſet aſide an uſurious contract the defendant may demur to the diſcovery of what intereſt he agreed to take; for he cannot ſet forth that without diſcloſing the very intereſt he has taken. 2 *Atk.* 393. 1742. *Chauncey* v. *Tabourden.*

3. *Per* Lord *Hardwicke.* If a contract be made in *England* for a mortgage of a plantation in the *Weſt Indies*, no more than legal intereſt ſhall be paid upon ſuch mortgage, and if in ſuch caſe there is a covenant in the deed for payment of 8*l. per cent.* intereſt, it is within the ſtat. of uſury, notwithſtanding this is the rate of intereſt where the land lies. 3 *Atk.* 727. 1750. *Stapleton* v. *Conway* (*a*).

(*a*) See Suppl. 260. pl. 13.

4. 2000*l.* lent on condition to pay in a year 200*l.* and the principal, or 250*l. per ann.* during the borrower's life, not uſurious. 1 *Veſ.* 164. 1748. *Wortley* v. *Pitt.*

5. Whoever brings a bill in the caſe of uſury muſt ſubmit to pay the principal and intereſt due, on which the court will give give relief. 1 *Veſ.* 320. 1749. *Henkle* v. *Royal Exchange Aſſurance Company.*

6. One agrees to lend money on mortgage; he ſells ſtock, which was under par, and advances the money raiſed by ſale, and takes ſecurity for the nominal ſum ſold, and intereſt for it: held uſury. *Ambl.* 371. 1759. *Moore* v. *Battie.*

7. A judgment having been obtained at law, though for an uſurious debt, the creditor muſt ſtand as a judgment creditor for the money actually advanced and legal intereſt. 2 *Bro. Cha. Rep.* 641. 1789. *Scott* v. *Neſbitt.*

8. To conſtitute uſury there muſt be a loan; therefore an agreement to purchaſe, and pay rent till the purchaſe-money paid, is not uſury. 4 *Bro. Cha. Rep.* 28. 1792. *Spurrier* v. *Mayoſs*, 1 *Veſ. jun.* 327. S. C.

9. An advantage to be taken by a partner out of the trade may be meaſured in any way agreed on, and will not be uſurious. 2 *Veſ. jun.* 248. 1793. *Anderſon* v. *Maltby.*

10. *Poſt obit* bonds, though upon terms of groſs inequality, eſtabliſhed; ſuch ſecurities not being liable to be impeached on the ground of uſury. 5 *Veſ. jun.* 27. 1799. *Wharton* v. *May.* 1 *Anſtr.* 7. *Mathews* v. *Laws*, S. P.

11. A cuſtom in *Liverpool* for the banker to ſtrike a balance every quarter, and ſend the account to the merchant, and then to make that balance carry intereſt, as principal, for the next quarter, is not uſury. 2 *Anſtr.* 495. 35 *G.* 3. *Calcot* v. *Walker.*

[G] # Utlawry.

22 Vin. 328. ## (A. 12) In what Actions, (or Caſes.)

1. IF defendant avoids arreſt, though he appear publicly, he may be outlawed. *Barnes*, 320.

2. On total abſconding no endeavours to arreſt are neceſſary. *Ibid.* 322.

3. It lies on an information; and on an information for any offence, in its nature againſt the laws of ſociety, and that diſturbs the good order that keeps a ſtate in peace, (the true meaning of *contra pacem*,) though not with actual force. *Rex* v. *Wilkes*, 4 *Burr.* 2527.

(F. a) Pleadings. Outlawry. How it may, or ought to be pleaded or ſet forth.

1. IN criminal caſes, the priſoner muſt firſt plead to the outlawry, and that muſt be tried before he can plead to the indictment. *Rex* v. *Johnſon*, 2 *Stra.* 824.

2. He may plead *ore tenus*, the Attorney-General reply *ore tenus*, the venue is awarded returnable *inſtanter*, and the jury returned ſitting the court. *Ibid.*

3. The court cannot aſſign the defendant counſel on an outlawry for treaſon till he has pleaded, and then he may have counſel on the collateral matter. *Rex* v. *Davies*, 1 *Burr.* 638.

22 Vin. 363. ## (G. a) Pleadings.

1. IF it appear on the record that the writ of proclamation was delivered to the ſheriff three months before the return of it, it is ſufficient, though it be not ſo expreſsly alleged. 4 *Term Rep.* 521.

2. The names of the coroners need not be ſubſcribed to the judgment of outlawry; if it appear on the record that the judgment of outlawry was given by them it is ſufficient. *Ibid.*

3. It need not appear on the record of outlawry that the *capias* and exigent were ſealed by the juſtices of oyer and terminer, &c. *Ibid.*

4. It need not be ſtated in expreſs terms on a record of a judgment of outlawry that a writ of *capias* iſſued againſt the defendant, it

it is ſufficient if it appear "that the ſheriff was commanded to *take* the defendant," &c. *Rex* v. *Perry*, 6 *Term Rep.* 573.

5. The writ of proclamation required the ſheriff to proclaim the parties in *open court in the ſheriff's county*, (not ſaying county court,) and held good. 4 *Term Rep.* 521.

6. The ſheriff need not allege in his return to the writ of proclamation, that "the perſons proclaimed did not appear and render themſelves," though he muſt in his return to the exigent. *Ibid.*

7. The ſheriff muſt ſtate in his return to the writ of exigent the day and year of each exaction; ſtating that on ſuch day *in the 30th year of the reign*, he exacted the defendant a third time; that afterwards, on ſuch a day, he exacted him a fourth time; and that *afterwards* on ſuch a day, in the 31ſt *year aforeſaid*, he exacted him a fifth time, is inſufficient, and a good ground for reverſing the outlawry. *Rex* v. *Almon* (in error.) 5 *Term Rep.* 202.

8. If one exigent be awarded againſt the principal and acceſſary together, it is error only as to the latter. 4 *Term Rep.* 521.

9. In a record of outlawry, it appeared by the writ of proclamation, and the return to it, that the priſoners were required to *render themſelves* to the ſheriff, ſo that he might *have their bodies before the juſtices*, &c. at the return of the writ, and held good. *Rex* v. *Yandell*, 4 *Term Rep.* 521.

10. The writ of *capias utl.* and the ſheriff's return to it, ought to be filed with the clerk of the exigents. *Reynolds* v. *Adams*, 3 *Term Rep.* 578.

(B. b) Reverſed. What muſt be done in order to get an Outlawry reverſed. 22 Vin. 379.

1. A Perſon committed for high treaſon, in diminiſhing the coin, who makes his eſcape before indictment, and is then indicted and outlawed, and then retaken within the year, may have *habeas corpus* to *B. R.* and ſurrender; then have *certiorari* to remove the proceedings, plead his having been beyond ſea, and have the outlawry reverſed. *Rex* v. *Johnſon*, 2 *Stra.* 824.

2. An outlawry for felony ſhall be reverſed, if it appear on the writ of proclamation and the return to it, that the perſon indicted was outlawed after a day had been given him in court, and before ſuch day arrived. 3 *Term Rep.* 499. *Rex* v. *Barrington.*

3. If in debt on bond by wife *dum ſola* the huſband is gone abroad and outlawed, and the wife, though ſhe appears publicly is waived, the outlawry againſt her ſhall be ſet aſide, on motion; but goods taken on *capias utlagatum* muſt be deemed the huſband's, though ſworn to be her ſeparate goods, and if ſhe has equitable right, ſhe muſt apply in equity. *Biſcoe* v. *Kennedy*, 2 *Wilſ.* 127.

4. If defendant was priſoner pending exigent, outlawry ſhall be reverſed on common appearance. *Barnes*, 321.

5. Where

5. Where outlawry is not ſpecial, defendants may reverſe it at their own expence and payment of coſts on common appearance if before tranſcribing into the Exchequer, common coſts to the exigent, if after coſts to the time of reverſal. *Barnes*, 324.

6. If plaintiff dies after judgment, there muſt be *ſcire facias*, or outlawry ſhall be ſet aſide. *Barnes*, 325.

7. Outlawry commenced and proſecuted during defendant's reſidence in *Ireland* ſhall be reverſed without bail or appearance. *Barnes*, 325.

8. If *feme ſole* is waived ſpecially on meſne proceſs, and after exigent, and before outlawry marries, the court will not interpoſe. *Barnes*, 321.

9. If an exception goes to ſhew that the outlawry is a nullity, it avoids it without writ of error. *Rex* v. *Davies*, 1 *Burr.* 638.

10. No bail is given in error of an outlawry till reverſal, and then it is to appear to an original to be brought in two terms. *Ducket* v. *Martin*. 2 *Stra.* 951.

11. But on reverſal ſpecial bail muſt be given, though there was no affidavit originally of the debt, if the debt was bailable. 2 *Stra.* 1178.

[G]

Variance.

21 Vin. 538.

(A) Between the Count and Specialty.

1. EVIDENCE of a houſe ſituate in the pariſh of *M.* will ſupport an averment of a houſe "at *S.*" *S.* being extra-parochial, and both places uſually going by the name of *S.* *Burbige* v. *Jakes*, 1 *Boſ. & Pull.* 225.

2. In an action of debt on a ſimple contract, the declaration is good, though it ſpecify a *leſs ſum* in the ſeveral counts than is demanded in the recital of the writ, and yet aſſigns as a breach the non-payment of the ſum demanded in the writ. *M'Quillen* v. *Cox*, 1 *H. Bl.* 249.

3. In an action againſt the ſheriff for taking goods without levying a year's rent, the plaintiff undertaking to ſet forth the particulars of the demiſe, (which was unneceſſary,) and not proving them as laid, muſt be nonſuited. *Briſtow* v. *Wright*, *Dougl.* 642.

4. In an action for bribery, the declaration ſtated the precept to be directed to the *mayor* only; but the precept proved was directed to the *mayor and burgeſſes*; which was held to prove the declaration. *Cuming* v. *Sibley*, 1 *Term Rep.* 239. (*n.*)

5. Variance in a declaration by describing a statute on which the action was brought to be a statute of the 4 *Philip & Mary*, whereas it was a statute made the 4 & 5 *Philip & Mary*, is fatal. *Rann* v. *Green*, 2 *Cowp.* 474.

6. Declaration against the defendant as assignee of *all the estate*, &c. in certain premises, evidence that he is assignee of *part only* is a *fatal variance*. *Hare* v. *Caton*, 2 *Cowp.* 766.

7. In an action for an amercement in a court leet, if the declaration state the court to have been held before the *steward* of the manor; but the evidence prove it to have been holden before the *deputy steward*, it is a fatal variance. *Wyvill* v. *Shepperd*, 1 *H. Bl.* 162.

8. In an action against the defendant for negligence as an attorney, in not prosecuting a debtor of the plaintiff's to judgment; the return of the writ on which the debtor was arrested being laid to be in the 25th year of the reign, &c. and the writ itself appearing to be returnable in the 24th year, this was held to be a fatal variance, even though the day of the return was alleged in the declaration under a *videlicet*. *Green* v. *Rennell*, 1 *Term Rep.* 656.

9. Where the declaration in an action for negligence sets out the writ, it is not sufficient that the name of the party and the name in the writ have the same sound; any misspelling is fatal. *Brown* v. *Jacobs, Gent.* 2 *Esp. Rep.* 726.

10. Proof that defendants run down the plaintiffs in the half-way reach in the *Thames* will support an allegation that the boat was run down on the *Thames*, *near* the half-way reach, because the place is not material: *aliter*, if the place be material, as where a justification is local. *Drewry* v. *Twiss*, 4 *Term Rep.* 558.

11. So where an action on the case was brought upon an agreement that the defendant would procure the plaintiff a booth at the horse-race on *Barnet* common, and the delaration alleged *Barnet* common to be in *Middlesex*, whereas it was in *Hertford*, yet held to be surplusage, because it was immaterial to the agreement whether *Barnet* common lay in *Middlesex* or *Hertford*. 4 *Term Rep.* 561. (*n*).

12. In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff alleged in his declaration that the defendant undertook to deliver, &c. in consideration of the hire to be paid *by the plaintiff*, and proved that the hire was to be paid by the *consignee*; it was held not to be a variance, the consignor being liable by law. *Moore* v. *Wilson*, 1 *Term Rep.* 659.

13. In an action on a policy of insurance the declaration stated that *after* making the policy the ship sailed, the evidence was that she sailed *before*; held, that the variance was immaterial. *Peppin* v. *Solomons*, 5 *Term Rep.* 496.

14. Evidence of an agreement to deliver goods to the defendant is a variance from a count on an agreement to deliver them to another person. *Levy* v. *Goodson*, 4 *Term Rep.* 687.

15. Declaration

15. Declaration for 52*l.* 10*s.* for run money; evidence, a note for 52*l.* 10*s.* for run money, with an additional ſtipulation written, after ſignature of the note, for a pint of rum *per* day, and held no variance. *Baptiſte* v. *Cobbold*, 1 *Boſ. & Pull.* 7.

16. In caſes upon contracts it is neceſſary to ſet out the contract truly, and a difference in any part is fatal, becauſe the contract is entire. 1 *Term Rep.* 240. (*n.*)

17. Where the contract declared upon was, that the defendant ſhould deliver to the plaintiff all his tallow at 4*s. per* ſtone, and the contract proved was, that the defendant ſhould deliver it at 4*s. per* ſtone, *and ſo much more as the plaintiff paid to any other perſon*: this was held a fatal variance. *Churchill* v. *Wilkins.*

For more of *Variance* in general ſee *Miſnomer*, *Trial*, and other proper titles.

Vendor and Vendee.

21 Vin. 541. (A) Diſputes between them. Bills to carry Articles into Execution.

1. A proviſo in articles for the purchaſe of an eſtate, that if either ſhould break the agreement, he ſhould pay 100*l.* to the other; the defendant, on being offered two years purchaſe more, accepted it; the court decreed a ſpecific performance of the articles. 2 *Atk.* 371. *July* 1741. *Howard* v. *Hopkins.*

2. A penalty has never been held to releaſe parties from their agreement, for though incurred, they muſt perform the agreement notwithſtanding. *Ibid.*

3. In general a bill will not lie for a ſpecific performance of contracts for chattels, or which relate to merchandize, but it will be left to law; but where the agreement was not to be final, but to be completed by ſubſequent acts, a bill will lie to carry it into execution. 3 *Atk.* 383. 1746. *Buxton* v. *Leſter.*

4. It is in the diſcretion of the court either to decree a ſpecific performance, or leave the parties to their remedy at law. 3 *Atk.* 388. *Oct.* 1746. *Joynes* v. *Statham.*

5. Leſſee for years of mortgaged premiſes agreed to purchaſe the mortgage for leſs than the original mortgage-money, they being much decreaſed in value, and a guinea was paid in part, not as earneſt; he alſo bought in the equity of redemption; but before the ageement was fully executed, the plaintiff having notice of the agreement, intervenes, and by offering the mortgagee ſomewhat more, takes the bargain out of his hands, and files a bill to compel him to redeem on payment of the whole mort-

gage-

gage-money, or be forecloſed. The Chancellor thinking that the plaintiff being a purchaſer *malâ fide* ſhould have only what he actually paid, he conſented to accept it. 1 *Veſ.* 2. 1746-7. *Scot* v. *Merray.*

6. Huſband decreed to join, and to procure the wife to join in the conveyance of her eſtate purſuant to an agreement, or to refund a ſum of money received by the huſband, where the court could not make a perſonal decree upon her. 2 *Veſ.* 57. 1750. *Sedgwick* v. *Hargrave.*

7. A copyholder contracts, for valuable conſideration, to ſell to his ſon, and dies before actual ſurrender; the ſon is entitled to a performance, and to compel the widow to ſurrender her free-bench. 2 *Veſ.* 631. 1755. *Hinton* v. *Hinton.*

8. *A.* having been guilty of a breach of a former contract, *B.* refuſed to treat with him; a third perſon treated with *B.*, in fact in truſt for *A.*, and an agreement having been entered into, *A.* filed his bill for a ſpecific performance. Bill diſmiſſed. 1 *Bro. Cha. Rep.* 95. *Mich.* 14 *G.* 3. *Eyre* v. *Popham, in notis.* See *Fenham* v. *Child, Ibid.* 95. *contrà.*

9. Sale of an eſtate for a certain ſum of money, and an annuity for life, the agreement being fair, a court of equity will decree a ſpecific performance, although the party die before any payment of the annuity. 1 *Bro. Cha. Rep.* 156. 1782. *Mortimer* v. *Capper.*

10. Bill for a ſpecific performance againſt the vendor, the vendee or his heir being in poſſeſſion, the agreement having been made between the tenant for life and the reverſioner, and an account of the vendee's perſonal eſtate becoming neceſſary, an early day was appointed for payment of the purchaſe-money, and on failure, the bill *quoad hoc* to be diſmiſſed with coſts. 1 *Bro. Cha. Rep.* 396. 1784. *Lowther* v. *Andover.*

11. A ſpecific performance was not decreed where there was a concealment on the part of the vendor. 1 *Bro. Cha. Rep.* 440. 1785. *Shirley* v. *Stratton.*

12. At a public auction the ſeller's agent bid for the plaintiff; a ſpecific performance refuſed. 2 *Bro. Cha. Rep.* 326. 1788. *Twining* v. *Morrice.*

13. Where reverſionary intereſts in ſtock had been ſold for an apparently under-price, the court directed an inquiry into their real value previous to decreeing a ſpecific performance. 3 *Bro. Cha. Rep.* 228. 1791. *Collet* v. *Woollaſton.*

14. A contract that the one party ſhall convey an eſtate, and the other grant an annuity, ſhall be carried into execution, though the vendor died previous to any payment of the annuity, one having accrued due and having been tendered. 3 *Bro. Cha. Rep.* 605. *Jackſon* v. *Lever.*

15. *A.*, an apothecary, gave *B.*, his patient, 50 guineas to receive 500*l.* or an annuity of 100*l.* if he ſhould ſurvive a year, which he did. Bill by *A.* againſt the executors of *B.* to enforce the agreement, diſmiſſed, but without coſts, on account of the money actually advanced, which muſt have been repaid on a bill

to

to ſet aſide the agreement. 1 *Veſ. jun.* 214. 1790. *Prieſtly* v. *Wilkinſon.*

16. Agreements for ſale of an eſtate, eſpecially if by auction, depend on the *bona fides* of the tranſaction; therefore triffing errors in the deſcription are not material. 1 *Veſ. jun.* 221. *July* 1790. *Calcraft* v. *Roebuck.*

17. Property in a cargo transferred by a bill of ſale ſigned by the vendor and vendee; a new agreement ſigned by them before they parted, that it ſhould be ſold and accounted for by the factor for the vendor, ſhall be enforced in equity. 1 *Veſ. jun.* 416. 1792. *Weymouth* v. *Boyer.*

18. Performance cannot be decreed of an agreement with a variation made in it by the court. 4 *Bro. Cha. Rep.* 477. 1793. *Jordan* v. *Sawkins.*

19. Bankruptcy of a perſon who had agreed to purchaſe, does not diſcharge the contract. 3 *Veſ. jun.* 255. 1796. *Brook* v. *Hewitt.*

20. At an auction one perſon only bid for the vendor to 75*l.* an acre upon a private notice to the auctioneer; then, after a conteſt with real bidders, the eſtate was bought at 101*l.* 17*s.* an acre, and the purchaſor, ſome days afterwards, paid the duty: he was decreed to perform the contract with coſts. 3 *Veſ. jun.* 620. 1798. *Bramley* v. *Alt.*

21. Where all the bidders at a public auction, except the buyer, are bidding for the vendor without notice, and the buyer is thereby induced to give more than the value, neither courts of law nor equity will ſupport it. *Ibid.* 624.

22. No objection to a ſale by auction that perſons were employed by the vendor to bid for him without public notice. *Ibid.*

23. One truſtee for the ſale of an eſtate, having releaſed and conveyed to his co-truſtee, refuſed to join in the receipt of the purchaſe-money; upon the ſpecial expreſſion of the deed the purchaſer was not held to the agreement with the remaining truſtee: it would have been otherwiſe if one had merely renounced. 4 *Veſ. jun.* 97. 1798. *Crewe* v. *Dickins.*

24. A vendor cannot come at any diſtance of time for a performance; but upon a bill filed 14 months after the correſpondence upon objections to the title ceaſed by the defendant's returning no anſwer to the laſt letter, calling for a diſtinct anſwer, and threatening the bill, and the auctioneer not having been called upon for the depoſit, it was referred to the Maſter. 5 *Veſ. jun.* 719. 1800. *Marquis of Hertford* v. *Boore.*

25. Specific performance refuſed on account of the laches of the plaintiff the vendor. A ſmall incumbrance, which may be the ſubject of compenſation, is no objection to a ſpecific performance. 5 *Veſ. jun.* 818. 1801. *Gueſt* v. *Homfray.*

26. Though a perſon may agree to ſell at a price to be fixed by arbitration, and the award can be impeached upon the grounds affecting all awards as fraud or groſs miſtake; yet upon ſuch an agreement, where ſome of the perſons to be bound were married

women, of whom alſo one had not executed; the court refuſed a ſpecific performance, and diſmiſſed the bill, leaving the plaintiff to law. *Emery* v. *Waſe.* 1801. 5 *Veſ. jun.* 846.

27. *A.* deviſed the reſidue of his property to his wife in truſt, to divide amongſt their children in ſuch manner as they ſhould deſerve; one of the ſeven children ſold her ſhare, and covenanted to make it up a full ſeventh. This is good, and on a bill for a ſpecific performance, ſhe can make a good conveyance without the mother's joining. 1 *Anſtr.* 32 *G.* 3. *Muſprat* v. *Gordon and others.*

28. Bill for a ſpecific performance of an agreement for the ſale of lands and chattels. Plea, the ſtatute of frauds. The defendant, during the negociation, delivered a particular of the whole ſigned by him, the agreement was afterwards made at a leſs price; both parties gave inſtructions to an attorney to prepare a conveyance; and the defendant delivered to him the particular, as inſtructions for the deed, which was prepared. This is not ſufficient to take it out of the ſtatute, and being void as to the lands, is void *in toto.* The bill charged, that the defendant had written letters to the attorney who was to prepare the conveyance, in which the agreement was admitted; he muſt anſwer that fact. 2 *Anſtr.* 421. *Hil.* 34 *G.* 3. *Cooke* v. *Tombs.*

29. Where by the terms of an auction the ſale is to be completed by a certain day, yet if neither party takes any ſtep to quicken the other, till it becomes impoſſible to execute the agreement by the day fixed, the time is waived, and equity will interfere to prevent the purchaſor taking advantage of it at law. 3 *Anſtr.* 924. 37 *G.* 3. *Jones* v. *Price.*

30. In the caſe of a bargain and ſale, without inrolment, the court will compel the vendor to make a title. 6 *Veſ. jun.* 745. 1802. *Curtis* v. *Perry.*

31. Where the vendee orders a particular mode of conveyance for goods ordered by him, and a loſs happens in the carriage, he muſt ſtand to it. *Vale* v. *Baile, Cowp.* 296.

32. If the vendor ſell goods by ſample, to be delivered to the vendee within a month, and take earneſt, and within a month ſend them by his ſervants to the premiſes, where, part being unloaded, the reſt are diſtrained for toll; the delivery is complete, ſo as to intitle the vendee to bring treſpaſs for the ſeizure. The delivery was complete in reſpect to third perſons the moment the vendor delivered the goods to his own ſervant to carry to the vendee. *Blakey* v. *Dinſdale, Cowp.* 664.

33. A creditor took an abſolute bill of ſale of the goods of his debtor, but agreed to leave them in his poſſeſſion for a limited time; in the mean time the debtor died, and the creditor took and ſold the goods; he was held liable as executor *de ſon tort*, for the continuing in poſſeſſion was fraudulent and void againſt creditors; and it is a general rule that in chattels poſſeſſion muſt accompany the deed of transfer; unleſs where the ſale is conditional and the vendor

vendor continues in poſſeſſion till the performance of the condition. *Edwards* v. *Harben*, 2 *Term Rep.* 587.

Vide *Contract*, *Bill of Sale*, and other proper titles.

21 Vin. 542. (B) Diſputes between them relating to the Title.

1. CONTRACT for a purchaſe in lots; no title can be made to two of the lots, and others had been deteriorated; if the former were not ſo blended with the remaining lots as to injure them, a ſpecific performance ſhall be decreed as to all but the two. 2 *Bro. Cha. Rep.* 118. 1786. *Poole* v. *Shergold.*

2. Advertiſement of an eſtate for ſale by auction deſcribed it all as freehold, though a ſmall part was held at will. After an execution of articles a treaty for an exchange of that part took place, pending which, at the time appointed for completing purchaſe, the purchaſor took poſſeſſion forcibly; but proceeded in the treaty afterwards, till he finally refuſed to agree to the purchaſe. On a bill by the vendor, the purchaſe money was decreed to be paid, with 4*l. per cent.* from the time it ought to have been paid; but an inquiry was directed as to what ought to have been the compenſation at that time for the part not freehold, and that, with the outgoings, to be deducted. 1 *Veſ. jun.* 221. 1790. *Calcraft* v. *Roebuck.*

3. Specific performance of a purchaſe ſhall not be decreed where the title is doubtful. 4 *Bro. Cha. Rep.* 80. 1792. *Cooper* v. *Denne.* 1 *Veſ. jun.* 565. S. C.

4. A purchaſor under a bankruptcy muſt take ſuch title as the bankrupt had, and cannot inſiſt upon a title ſtrictly free from objection; in ſuch a caſe the purchaſor objecting tothe title, but inſiſting on his purchaſe, his bill for a ſpecific performance was, under the circumſtances, diſmiſſed with coſts, except as to ſome parts of the anſwer and depoſitions containing irrelevant matter, 5 *Veſ. jun.* 145. 1799. *Pope* v. *Simpſon.*

5. Upon a late deciſion of the court of Exchequer, that a preſumption from non payment of tithes cannot bar even a lay impropriator, the Lord Chancellor, though holding a contrary opinion, would not compel a purchaſor to take ſuch a title, but diſmiſſed the bill againſt him for a ſpecific performance. 5 *Veſ. jun.* 186. 1800. *Roſe* v. *Calland.*

6. Bill for a ſpecific performance of a contract for a ſale of the eſtate, upon various objections to the title, diſmiſſed in the firſt inſtance without any reference. 5 *Veſ. jun.* 722. 1801. *Omerod* v. *Hardman.*

7. Contract for the ſale of houſes, which from defects in the title could not be completed on the day. The treaty however proceeded, upon a propoſal to waive the objections upon certain terms. The houſes being burnt before a conveyence, the purchaſor is bound, if he accepted the title; and the circumſtance, that

that the vendor ſuffered the inſurance to expire at the day on which the contract was originally to have been completed, without notice, makes no difference. A reference to the Maſter was therefore directed to inquire whether the propoſal was accepted or acquieſced in on behalf of the purchaſor. 6 *Veſ. jun.* 349. 1801. *Paine* v. *Miller.*

8. A purchaſor who cannot have the original title deeds, the eſtate being ſold in a great number of lots, is intitled to atteſted copies at the expence of the vendor, notwithſtanding the inconvenience and expence. 6 *Veſ. jun.* 460. *Dace* v. *Tucker.* 1801.

9. In the caſe of a bargain and ſale without inrolment, the vendor will be compelled to make a title. 6 *Veſ. jun.* 745. 1802. *Curtis* v. *Perry.*

10. Sale of a ſhip at ſea good without actual delivery. 1 *Anſtr.* 222. 33 *G.* 3. *Addis* v. *Baker.*

11. By the terms of an auction the title deeds were to be produced by a certain day: they were not then ready; but the purchaſor received them afterwards without objection, he cannot afterwards, on diſliking the title, object to the delay. 2 *Anſtr.* 527. 35 *G.* 3. *Smith and others* v. *Burnham.*

12. Upon a motion for an injunction to ſtay proceedings at law, it appeared, that the defendant had agreed to purchaſe an eſtate from the plaintiff for 100*l.* and for an annuity for her life; but it was not ſpecified what ſecurity ſhould be given for the annuity: and the queſtion was reſpecting the ſecurity, and the court decided, that it ſhould be charged upon the purchaſed eſtate, and be ſecured alſo by bond and judgment. 2 *Anſtr.* 550. 35 *G.* 3. *Remington* v. *Deverall.*

(D) Vendor and Creditors of Vendee. Diſputes relating to Purchaſe-Money unpaid, and what ſhall be ſaid a Payment.

21 Vin. 543.

CHARGE or direction by deed or will for payment of debts generally, followed by ſpecific diſpoſitions; the purchaſor is not bound to ſee to the application of the purchaſe-money. 6 *Veſ. jun.* 1802. *Jenkins* v. *Wiles.*

(E) Diſputes relating to the Particulars of the Eſtate.

21 Vin. 543.

OBJECTIONS by a purchaſor by auction, firſt, That a way round and acroſs a meadow was not ſpecified. 2dly, On account of a bidding for the plaintiff. A ſpecific performance was decreed with coſts. 5 *Veſ. jun.* 508. 1800. *Oldfield* v. *Round.*

21 Vin. 544. (F) Diſputes as to Accidents befalling the Eſtate after the Contract.

1. WHERE a purchaſor has an advantage by the dropping in of lives, the court will direct an inquiry what increaſe was proper to be paid by him on that account. 2 *Atk.* 489. 1742. *Davy* v. *Barber.*

2. A purchaſor of a future intereſt, after a term, ſhall not pay intereſt, nor an increaſed price for a part of the term elapſing before the purchaſe is completed, unleſs the delay be his fault. 3 *Anſtr.* 877. 379. *Growſock* v. *Smith.*

22 Vin. 546. (G) Which of them is to do the firſt Act.

1. THOUGH the vendor of the eſtate does not produce his deeds, or tender a conveyance within the time limited by the articles, the court does not regard this neglect, but will decree a ſale notwithſtanding. 1 *Atk.* 12. 1737. *Gibſon* v. *Patterſon.*

2. Specific performance of an agreement to purchaſe may be decreed after conſiderable delay, if the vendee has not demanded his depoſit, or ſhewn a determination not to proceed in the purchaſe. 4 *Bro. Ch. Rep.* 329. 1793. *Pinke* v. *Curtis.*

3. On ſale of a reverſion part of the terms was, that the purchaſe-money ſhould be paid by a certain time; not being ſo by default of the vendee, the vendor was diſcharged from his contract. 4 *Bro. Cha. Rep.* 391. *Newman* v. *Rogers.*

4. Specific performance refuſed on the laches, and trifling conduct of the plaintiff, the contract being for a ſale to the plaintiff under a bankruptcy of a reverſionary intereſt for life, which in the interval fell into poſſeſſion; the defendants alſo being in ſome degree remiſs, the bill was diſmiſſed without coſts, upon delivering up the agreement. 4 *Veſ. jun.* 667. 1799. *Spurrier* v. *Hancock.*

For more of *Vendor and Vendee* in general, ſee *Conditions, Fraud, Purchaſor*, and other proper titles.

Ventre Inſpiciendo. [G]

(A) Awarded, by whom, and in what Caſes. 21 Vin. 546.

1. A Writ *de ventre inſpiciendo* againſt a married woman whoſe huſband had been near ten years abroad, on the application of a deviſee in a will, there being a limitation in the will, that if ſhe had a male child within 40 weeks after the teſtator's death, he ſhould take previous to the deviſee; ordered to iſſue, but to lie in the office 14 days, and if ſhe ſubmitted to the examination of midwives in the mean time, not to go, otherwiſe to iſſue. 4 *Bro. Cha. Rep.* 90. 1792. *Ex parte Wallop.*

2. An heir *apparent* cannot have a writ *de ventre inſpiciendo.* 6 *Veſ. jun.* 260. 1801. *Lord Durſley* v. *Fitzhardinge.*

3. This writ is now granted not only to an heir at law, but to a deviſee, whether for life, or in tail, or in fee. *Ex parte Bateman*, at the Rolls, 16 *Dec.* 1784. *Ex parte Bellett*, at the Rolls, 20 *Dec.* 1786. *Ex parte Brown*, in Cha. *Trin.* term, 1792.

View. [G]

(A. 2) In what Actions it lies. 21 Vin. 551.

1. THE ſtat. 4 and 5 *Ann. c.* 16. *ſ.* 8. does not extend to *criminal* caſes, ſo that on *them* there can be no rule for a view without mutual conſent.

2. Previouſly to the above mentioned ſtatute, there could be no view till after the cauſe had been brought on to trial, when, if the court thought a view neceſſary, the cauſe was deferred, and a view had by the jurors before it came on again. Upon this ſtatute it had become the practice to grant a view of courſe upon the motion of either party, and a notion having prevailed that ſix of the firſt twelve upon the pannel muſt attend upon the view, and that if they did not appear at the trial the cauſe muſt be put off, Lord *Mansfield* and the other judges, interfered to remedy the abuſe to which *views* were perverted, and to prevent their being miſuſed to purpoſes of delay and injuſtice; for they were

all decidedly of opinion that the motion on the act of parliament ſhould not be granted, unleſs the court was ſatisfied that it was proper and neceſſary, and they thought it better that a cauſe ſhould be tried upon a view had by any ſix of the jurors, or by fewer than ſix, or even without any view at all, than that the trial ſhould be delayed for a great length of time. They accordingly reſolved not to grant a view any more, without a full examination into the propriety and neceſſity of it, unleſs the party applying would come into ſuch terms as might prevent an unfair uſe being made of it. Agreeably to this reſolution they required a conſent, which has ever ſince been made a part of the rule, that in caſe no view be had, or if a view be had by any of the jurors, though not ſix of the firſt twelve, yet the trial ſhall proceed, and no objection be made on either ſide, on account thereof, or for want of a proper return to the writ. See 1 *Burr.* 252. in which the practice concerning views is diſtinctly and fully ſettled.

3. There may be a view on treſpaſs, on affidavit that it will be better direction to the jury than any evidence. *Ellis* v. *South*, *Trin.* 8 *G.* 2.

4. It is never granted without affidavit, except in actions of waſte. *Barnes*, 467.

5. On a view the ſhewers may ſhew, not only the place in queſtion, but alſo the marks, boundaries, *&c.* to enlighten the viewers, and may ſay to them, "Theſe are the places to which we ſhall adapt our evidence at the trial." *Barnes*, 458.

[A] 21 Vin. 587.

Viſitor.

1. AN act of grace was held no bar to an inquiry by the viſitor of a college into offences committed before, although in a royal foundation. For the pardon is to offences againſt the crown as the executive power, which a breach of the private ſtatutes of a college is not. *Bentley* v. *Epiſc. Elcenſ.* 1 *Str.* 912.

2. A viſitor may puniſh one member of a college for a thing done by him with the others in their corporate capacity. *Ibid.*

3. The appointment of a biſhop to be viſitor, without adding his chriſtian name, extends it to his ſucceſſors, although not ſo expreſſed. *Ibid.*

4. If a viſitor cite one under his authority to appear before him as ſpecial viſitor under a body of ſtatutes of queen *Elizabeth*, when in fact his authority is as general viſitor under the foundation of *H.* 8. he has not purſued his power, for the authority as general viſitor cannot be enlarged or altered; and the proceedings are therefore irregular. *Ibid.*

5. This

5. This judgment was reverſed in the Houſe of Lords as to ſome of the points.

6. By the ſtatutes of the chapter of *Cheſter*, the biſhop had a general power *punire & reformare*, to viſit the chapter once in three years, to examine the dean and canons as to enormities, and to correct the ſame, and to expel ſcandalous members after being thrice in vain admoniſhed by the dean. The biſhop expelled a canon without any previous admonition from the dean: a *mandamus* to reſtore him was moved for and denied; for the right of viſitation cannot be loſt by the neglect of the dean. The biſhop has an original juriſdiction when he thinks proper to viſit, but cannot be *called* in till after admonition. The viſitor has an abſolute power, and there is no inſtance of a *mandamus* being granted to make a viſitor reverſe his own ſentence. *The King* v. *The Biſhop of Cheſter*, 1 *Bl. Rep.* 26. S. C. 1 *Wilſ.* 206.

7. Where the viſitatorial authority appeared doubtful, the court refuſed to grant a *mandamus* to compel the exerciſe of it; for in private juriſdictions the court has not inclined to intermeddle, where there was any doubt; and there is no inſtance of a *mandamus* to a viſitor. *The King* v. *The Biſhop of Ely*, 1 *Bl. Rep.* 58. S. C. 1 *Wilſ.* 166.

8. The viſitatorial power is a very convenient eſtabliſhment. The viſitor is a ſummary judge and without appeal, upon points which never ought to be inquired into in the courts of common law. *The King* v. *The Biſhop of Ely*, 1 *Bl. Rep.* 82. S. C. 1 *Burr.* 158. S. P. *Attorney-General* v. *Talbot*, 1 *Veſ.* 78.

9. The appointment of a viſitor gives him general authority, and preſcribing the mode of exerciſe of it will not circumſcribe it; it is only directory, but the founder may limit or control his power, and the excepted authority devolves on the king's courts. *Ibid.*

10. The appointment of a viſitor may be collected from the general tenor of the ſtatutes, or from giving a power to interpret the ſtatutes; to hear and determine complaints is incident to the office. *Ibid.*

11. When new fellowſhips are ingrafted upon the foundation of a college, the new fellows are *eo nomine* ſubject to all the rules and diſcipline of the college, and to the authority of the viſitor. *Ibid.*

12. Where it appears that one perſon is viſitor, and another has authority in a particular caſe under him, the court will not grant a *mandamus* to the inferior officer; the application is to the viſitor to make him do his duty. Dr. *Walker*'s caſe, *B. R. H.* 218.

13. A viſitor can have no power over the perſonal repreſentatives of perſons who were under his juriſdiction. *The King* v. *The Biſhop of Durham*, 1 *Burr.* 567.

14. Whether matters of property in cathedrals can be determined by a viſitor, or otherwiſe than according to the law of the land is a doubtful queſtion. *Ibid.*

15. Where an advowſon is left to a college under particular limitations of the perſons to be preſented, which limitations are contrary to the general ſtatures of the college, the viſitor has no authority over the preſentation, for it is a truſt in the whole body, of which he is a member, and he is bound to judge according to the ſtatutes; and the limitations therefore operate to exclude his authority; the juriſdiction is in the king's courts, and although the preſentee has ſubmitted to anſwer his ſummons, it does not admit the viſitatorial authority. *Green* v. *Rutherforth*, 1 *Veſ.* 462.

16. The viſitatorial power may be divided, and the immediate viſitors of a charity be ſubject to a ſuperior viſitor with power to remove them; and ſuch inferior viſitors may exerciſe their office, although the legal eſtate of the charity is in them, if others receive the profits; for then they do not viſit themſelves. *Attorney-General* v. *Middleton*, 2 *Veſ.* 327.

17. A *mandamus* was prayed to the biſhop of *Lincoln*, as viſitor of *Lincoln* College *Oxford*, to receive, hear, and determine the appeal of Dr. *Halifax*; the court determined that a viſitor is bound, and ſhall be compelled to hear the parties, and form ſome judgment, although they will not oblige him to go into the merits; for it is ſufficient if he decide that the appeal comes too late. 2 *Term Rep.* 338. (*n.*)

18. Where by the ſtatutes of a college the fellows are to nominate two perſons to the viſitor, by an inſtrument under ſeal, to which the viſitor is directed to give implicit confidence, of which two perſons the viſitor is to chuſe one to be head of the college; this does not concern him in his capacity of viſitor, and if he reject the nominees of the fellows and name a third perſon, on the ground of their not having followed the ſtatutes, a *mandamus* will iſſue. *The King* v. *The Biſhop of Ely*, 2 *Term Rep.* 336.

19. No ſentence of the viſitor is valid as ſuch, unleſs he ſummon the parties before him, and hear them before determining. *Ibid.*

20. Where there was no viſitor, nor heir, Lord *Mansfield* held that the viſitatorial authority in a college does not eſcheat to the king in Chancery, as a charity, for it is not a charity, but a corporation, and as ſuch the right devolves to the king to be exerciſed in the court of King's Bench. *Rex* v. *Gregory*, 4 *Term Rep.* 241. (*n.*)

21. But the authority of this opinion was afterwards denied, and the court held that in ſuch caſe, although the viſitatorial power, not being in tenure, cannot be ſaid to eſcheat, yet it devolves on the king, becauſe there is no other body to take it, and colleges ſhould rather be regulated by the court of Chancery by analogy to other eleemoſynary foundations, than by the court of King's Bench, under whoſe ſuperintendance are placed in general thoſe corporate bodies which regard the police of the country and the adminiſtration of juſtice. *The King* v. *The Maſter and Fellows of St. Catherine's Hall*, 4 *Term Rep.* 243.

22. King *Edward* the 6th, by letters patent, erects a free-ſchool at *Shrewſbury*, and gives the bailiff and burgeſſes power to name and appoint a ſchool-maſter, and to make laws to direct and govern him, with the advice of the biſhop of *Litchfield* and *Coventry*, and alſo for the preſervation of the revenue, *&c.* Queen *Elizabeth* increaſes the revenue of the ſchool, in conſideration whereof the bailiffs and burgeſſes agree to ſuch ordinances as Mr. *Aſhton*, (then head maſter,) ſhould, with the advice of the biſhop, make: who did accordingly make *ſeveral* relating to the diſpoſition of the revenues and qualifications of the maſter. *Anno* 20 *Elizabeth* by-laws were made, which had been adhered to for 150 years without interruption till lately; and now, upon an information by the Attorney-General, at the relation of the college of *St. John*, to compel the town to nominate according to the by-laws and uſage, it was firſt objected that by the letters patent of *Edward* the ſixth, he being the founder, is conſequently viſitor; and the decree prayed was interfering with the viſitatorial power, and the crown can viſit only under the great ſeal; but the court thought there was no weight in the objection, but that it might eſtabliſh the charity. *Bunb.* 215. *Eaſt.* 1726. *Attorney-General* v. *The Town of Shrewſbury.*

23. Petition to the Lord Chancellor as viſitor of *Trinity* hall *Cambridge*, there being no heir of the founder, to declare the election of a fellow void, and to order the petitioner to be admitted; the court of King's Bench having in a ſimilar caſe declined juriſdiction. The Lord Chancellor heard the petition, and upon conſtruction of the ſtatutes diſmiſſed it. The queſtion was, Whether the petitioner was *idoneus moribus et ingenio*, and turned upon the conſtruction of the word *mores*, which the Chancellor thought ſignified manners as well as morals, and that it would be to deſtroy the very purpoſe of the foundation, if he were to order the fellows to elect a perſon (however otherwiſe qualified) whoſe manners were diſſimilar to theirs, and whom the whole college had thought unfit to be elected. 2 *Veſ. jun.* 609. 1795. *ex parte Wrangham.*

Voire Dire.

[A]
23 Vin. 14.

1. THIS examination, which is for the purpoſe of impeaching the witneſs's competency, and thereby preventing him from being ſworn in chief, is allowed in *criminal* as well as in civil caſes. As in Lord *Lovat*'s caſe before the Lords for high treaſon, 20 *G.* 2. a witneſs was examined by the priſoner on the

voire dire. 9 *State Tr.* 639. 689. 704, 705. See also *Durham* and *Crowder's* case, 2 *Leach's Cr. Ca.* 538.

2. Where it appears to the court that the question to be put to the witness on the *voire dire* goes to affect his credit, and not to impeach his competency, the court will not allow it to be put, as in *The King* v. *Chriſtopher Layer, Eſq. B. R. Mich.* 9 *G.* 1. indicted for high treaſon; *Stephen Lynch* being produced as a witneſs on the part of the crown, Mr. *Layer* the priſoner, deſired he might be examined on the *voire dire*, whether he had a promiſe of pardon, or ſome other reward for ſwearing againſt him Sir *J. Pratt*, C. J. *Eyre*, *Powis*, and *Forteſcue Aland*, Juſtices, held, that the objection went only to the *credit* of the witneſs, which muſt be left to the jury; but the promiſe of pardon was no objection either to his competency or his credit. It was not a proper queſtion to aſk on the *voire dire*, becauſe if he had ſuch a promiſe it was either to ſpeak the truth or to ſpeak a falſehood. If it were to give a juſt and true evidence there was no harm in it, and if it was for ſpeaking that which was not true, the witneſs was not bound to anſwer the queſtion. The witneſs was examined.

3. A *juror* may be examined on the *voire dire* as to having a freehold. *Rex* v. *Francia*, 6 *State Tr.* 59.

Voluntary Conveyances.

(A) What are ſo, and what paſſes by them.

27 Vin. 25.

1. IN the caſe of voluntary ſettlements and wills, if there be no declaration of the truſt of a term, it reſults to the donor: otherwiſe where it is a ſettlement for a valuable conſideration. 1 *Atk.* 191. 1744. *Brown* v. *Jones and others.*

2. Before the ſtat. 3 *W.* 3. *c.* 14. the heir was not bound by lands deſcending to him where ſold or aliened before action brought, and if an obligor deviſed his land, the deviſee ſo ſelling was not liable to the obligee: this ſtat. was to remedy the defect in 13 *Eliz. c.* 5. of fraudulent conveyances and to extend it to fraudulent deviſes. 2 *Atk.* 204. 1741. *Kinaſton* v. *Clark.*

3. A ſettlement after marriage is good, where the huſband was not indebted at the time, and the wife when married an infant. 2 *Atk.* 520. 1742. *Middlecome* v. *Marlow.*

4. The court will not carry a voluntary conveyance of a bankrupt into execution againſt his aſſignees; otherwiſe as to a conveyance

veyance for a valuable conſideration before the bankruptcy. 2 *Atk.* 562. 1743. *Tyrrell* v. *Hope.*

5. A ſettlement after marriage by a perſon not indebted, is not within the ſtat. of fraudulent conveyances. 2 *Bro.* 90. 1786. *Stephens* v. *Olave.*

6. An aſſignment for a valuable conſideration of the property of the wife ſhall not avail in equity to defraud the wife and children of the ſettlement to be made by the huſband, before he can have any part of it. 3 *Veſ. jun.* 512. 1797. *Like* v. *Beresford.*

(C) Binding to Perſons claiming under them. 22 Vin. 17.

C. Having two ſons by her firſt huſband, made a ſettlement previous to her ſecond marriage, and without the privity of the intended huſband, whereby ſhe limited the eſtate to herſelf for life; remainder as to one moiety to *Chriſtopher* her youngeſt ſon in tail; and for want of iſſue of his body, to *Reynolds* in tail; and as to the remainder of the other moiety, to *Reynolds* in tail; and for want of iſſue of his body to *Chriſtopher* in tail; with remainder as to both moieties to her own right heirs. The lands ſo limited to *his* heirs, the ſecond huſband, having ſurvived the wife, deviſed and otherwiſe diſpoſed of. Held, that *Reynolds* and *Chriſtopher*, the two ſons of the firſt marriage, were entitled under their mother's ſettlement to *all* the lands; and that the parties claiming under the ſecond huſband, were accountable for the rents and profits from his death. 1 *Bro. Par. Caſ.* 181. 1707. *Calthorpe* v. *May.*

(D) Set aſide in favour of Purchaſors or Creditors. 22 Vin. 21.

1. WHERE the father, tenant for life, and ſon tenant in fee, join in a ſettlement, it is good againſt creditors, for the ſon might have diſpoſed of the reſiduary intereſt without the father's joining. 1 *Atk.* 16. 1738. *Ruſſel and others* v. *Hammond.*

A ſettlement being voluntary is not for that reaſon fraudulent, but an evidence of fraud only, and there is ſcarcely an caſe, where the perſon conveying was indebted at the time, that has not been deemed fraudulent. Ibid.

2. *B.* in 1718, after marriage, conveys his real eſtate to truſtees, in conſideration of 5*s.* and other valuable conſiderations, in truſt for himſelf for life, to his wife for life, then to his eldeſt ſon, if he ſurvived his father and mother, and ſo to the next ſon, *&c.* *B.* afterwards became bankrupt. This is a conveyance which falls directly within the clauſe of 21 *Jac.* 1. *c.* 15. and therefore the truſtees were decreed to convey to the plaintiffs the aſſignees under the commiſſion againſt *B.* 1 *Atk.* 93. 1745. *Walker and others* v. *Burrows.*

It has been ſaid that all voluntary ſettlements are void againſt creditors, equally the ſame as they are againſt ſubſequent purchaſors, under the ſtat. of the 27 Eliz. c. 4. But this will not hold, for there is a diſtinction between the two ſtatutes; it is neceſſary under

under the 13 Eliz. *to prove at the making of the ſettlement that the perſon conveying was indebted at the time, or immediately after the execution of the deed. But upon the ſtat.* 27 Eliz. *which relates to purchaſors, there a ſettlement is void, if voluntary, that is, not for a valuable conſideration, and the ſubſequent purchaſors ſhall prevail to ſet aſide ſuch ſettlement.* Per *Lord Chancellor.* 1 Atk. 93. 1745, Walker and Others v. Burrows.

3. Voluntary conveyances fraudulent againſt purchaſors. 3 *Atk.* 412. 1746. *White* v. *Janſum.*

4. The court will not decree a voluntary conveyance to be delivered up to a purchaſor on valuable conſideration, unleſs obtained by fraud. 1 *Atk.* 625. 1736. *Oxley* v. *Lee.*

5. Bill by an executor to have ſatisfaction out of the eſtate of the defendant's late father, upon a judgment given by him to the plaintiff's teſtator for 120*l.* The defendant, the eldeſt ſon of the conuſor of the judgment, protects himſelf under a ſettlement made after the marriage of his father and mother, in *May* 1694, in which the father was tenant for life, and the defendant firſt tenant in tail. In 1700 the father made a ſmall purchaſe jointly with the defendant of 4*l. per ann.* to them and their heirs. In 1708 he made another joint purchaſe with his youngeſt ſon of 5*l. per ann.* for 105*l.* and ſettled it by way of proviſion for younger children, and paid the purchaſe-money for both eſtates, and continued in poſſeſſion till his death in 1735. The ſons afterwards entered into poſſeſſion of the ſmall eſtates. The plaintiff inſiſts that all the eſtates were ſubject to his judgment for 120*l.*, and that the ſettlement in 1694 was after marriage, and therefore voluntary: and the Lord Chancellor *Hardwicke* was of opinion, that the ſettlement being in conſideration of a portion paid at the time, though after marriage, could not be impeached by ſubſequent creditors, but, as the father was in poſſeſſion of the purchaſed eſtates, and appeared the viſible owner thereof, and though it is not neceſſary that a man ſhould be actually indebted at the time he enters into a voluntary ſettlement, to make it fraudulent, yet if he does it with a view to be indebted at a future time, it is equally ſo: decreed the plaintiff to be let in upon the ſaid eſtates. 2 *Atk.* 477. 1742. *Stileman* v. *Aſhdown.*

6. Upon the marriage of the defendant with her late huſband, he and his father promiſed to ſettle an eſtate on her in conſideration of the marriage and 1000*l.* portion: but ſhe refuſing to let the father have the portion, he ſaid ſhe ſhould have none of his lands, and would not ſettle them upon her, but conveyed them to his ſon in fee, the ſon ſeven years afterwards being indebted, ſettled the eſtate upon her as a jointure, and then in ſtrict ſettlement, and died. His creditor brought his bill againſt his widow, and infant ſon, for ſatisfaction of the plaintiff's debt, which the Chancellor decreed accordingly. 2 *Veſ.* 27. 1747. *Beaumont* v. *Thorp.*

7. A man who had a ſon by a former wife, going to marry a ſecond with a portion of 260*l.* in conſideration thereof ſettles 400*l.* that if ſhe ſurvives him, or had iſſue by the marriage, the heirs or executors of the huſband ſhould after his death pay 400*l.* to the truſtees for the benefit of the wife for her life, and after her

her death for the iſſue of the marriage, together with the ſon by the former wife; which ſon happened to be the only ſurviving perſon, and his father deviſed all his eſtate to him, ſubject to payment of debts: bill by the father's creditors againſt the deviſee and heir at law, who admitted there was no freehold, but only copyhold lands. Queſtion, as to the 400*l.* whether the creditors might come upon the reverſionary intereſt thereof, and the court was of opinion that the creditors could not come upon this as being a voluntary diſpoſition to him. 1 *Veſ.* 215. 1748. *Ithell* v. *Beane.*

8. Where a voluntary conveyance is afterwards defeated by ſale for a valuable conſideration, a ſatisfaction cannot be demanded againſt the perſon making the conveyance or his eſtate, unleſs for ſome covenant upon which an action or a ſuit might be maintained. 1 *Veſ.* 516. 1750. *Williamſon* v. *Codrington.*

9. *Per* Lord *Hardwicke* Chancellor. There is no caſe where a perſon indebted makes a conveyance of a real or chattel intereſt for the benefit of a child without the conſideration of marriage or other valuable conſideration, and dying indebted afterwards, that it ſhall take place. There is certainly a difference been the ſtatute of frauds of the 13 *Eliz.* which is in favour of creditors, and the 27 of *Eliz.* which is in favour of purchaſors; but that difference was never ſuffered by way of general rule to go farther than this: on the 27 *Eliz.* every voluntary conveyance made, where afterwards there is a ſubſequent conveyance for valuable conſideration, though no fraud in that voluntary conveyance, nor the perſon making it at all indebted, yet the determinations are, that ſuch mere voluntary conveyance is void at law by the ſubſequent purchaſe for a valuable conſideration *; but the difference between that and the 13 of *Eliz.* is this; if there be a voluntary conveyance of real eſtate or chattel intereſt by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud ſubſequent creditors, that will be good: but if any mark of fraud, colluſion, or intent to deceive ſubſequent creditors, that will make it void: otherwiſe not, but it will ſtand, though afterwards he becomes indebted; but I know no caſe on the 13 of *Eliz.* where a man indebted at the time makes a mere voluntary conveyance to a child without conſideration, and dies indebted, but that it ſhall be conſidered as part of his eſtate for the benefit of his creditors. 2 *Veſ.* 11. 1750. *Lord Townſhend* v. *Williams.*

* *In* Cowper, 280. *Lord* Mansfield *doubts whether this was ſaid by Ld.* Hardwicke, *but afterwards in* Cowper, 710, 711. *he thinks ſuch a conveyance good, if no circumſtances of fraud appear, and that the* ſtat. 27 *of* Eliz. *does not impeach a ſettlement as being merely voluntary; but as fraudulent and covinous; and cites* Newſtead v. Searle *as a very ſtrong caſe,* 1 Atk. 265. *where a widow, on her marrying a ſecond huſband, mortgaged the ſettled eſtate to one, who had notice of the ſettlement, and it was held good againſt ſubſequent purchaſors or creditors. In* 2 Bro. 90. *it was held that a ſettlement after marriage by one not indebted was not within the ſtatute of fraudulent conveyances.* Note 2 Veſ. 10.

10. An executor advanced ſums of money to his daughters; to two of them on marriage, to the others as a voluntary gift, and afterwards died inſolvent, having received aſſets: on a bill by the legatees under the will, of which he was executor, held the voluntary

luntary gifts were fraudulent. *Ambl.* 596. 1754. *Partridge & ux.* v. *Gopp and others.*

11. A ſlight conſideration by a parent for a child, ſufficient to ſupport a ſettlement againſt a purchaſor. 2 *Veſ. jun.* 410. 1794. *Middleton* v. *Lord Kenyon.*

22 Vin. 22. (E) Voluntary Conveyance. Set aſide (not as fraudulent) but for other Reaſons.

A Voluntary deed kept by a perſon and never cancelled, will not be ſet aſide by a ſubſequent will. 1 *Atk.* 625. 1736. *Bougton* v. *Boughton.*

22 Vin. 27. (F) Poſtponed.

1. A Voluntary bond good againſt the executor, though to be poſtponed to a ſimple contract debt. 3 *P. Wms.* 223. *Mich.* 1733. *Lechmere* v. *Earl Carliſle.*

2. A voluntary bond ſhall be poſtponed in equity to debts on ſimple contract. Where a bond is claimed in conſideration of money lent, and the perſon fails in proving his conſideration, it cannot be ſet up afterwards as a voluntary bond. 1 *Atk.* 294. 1737. *Ramſden* v. *Jackſon.*

22 Vin. 23. (G) Favoured or relieved. How far, and againſt whom.

1. A Father's voluntary ſettlement upon his children otherwiſe unprovided for by him, may, when neither creditor, purchaſor, or any other having claim upon the father's eſtate is concerned, be carried into execution by a court of equity, as anſwering the father's natural obligation to provide for his children. But this obligation extends not to the neareſt collaterals, conſequently no ſuch ſettlement by one brother upon another can be entitled to the aid of a court of equity. 7 *Bro. Par. Ca.* 276. 1775. *Fitz-Edward* v. *Ryves.*

2. An huſband, voluntarily, and after marriage, allows the wife, for her ſeparate uſe, to make profit of all butter, eggs, pigs, poultry, and fruit, beyond what is uſed in the family; out of which the wife ſaves 100*l.* which he borrows and dies; ſhe ſhall come in as a creditor for this 100*l.*, and eſpecially as there is no defect of aſſets. 3 *P. Wms.* 338. 1734. *Slaiming* v. *Style.*

3. The court will not determine bonds to be voluntary, if they do not exactly tally with the ſum given for them; but if the contract was fairly entered into without any circumſtance of fraud, it has been held to be for a valuable conſideration. 3 *Atk.* 481. 1747. *Blount* v. *Doughty.*

4. Sir

4. Sir *Wm. Codrington*, in 1715, made a ſettlement of a plantation in *America*, "to have and to hold to truſtees to the uſe of "*William* and *John*, two *mulatto* boys, whom I had by a *negro* "woman, their heirs and aſſigns for ever; they paying to another "*mulatto* boy, *Thomas*, ſon to another *negro*, 50*l.* annually from "the day of my death, till *Thomas* arrives at 21, then to pay him "500*l.*;" with a clauſe, that he does oblige himſelf, his heirs, executors, and adminiſtrators, to warrant and for ever defend the ſaid plantation, negroes, ſtock, *&c.* In 1718 an ejectment is brought againſt him for the ſaid plantation, which he defends, but is evicted. He afterwards brings an ejectment in his own name, but it is compounded upon 1000 guineas being paid to him for his title and a conveyance of the eſtate. After his death a bill was filed by *William* in his own right, and as executor with another of his brother *John*, to have an account of the rents of the plantation, and a ſatisfaction for that rent received by Sir *William* in his life; and for the ſum of money for which he releaſed his right, with intereſt from the time of receiving it; and for the produce of the negroes, horſes, cattle, and other ſtock on the premiſes received by him. And the court decreed a ſatisfaction to the plaintiff for the value of the plantation, as it ſtood at the time of the ſale, and the negroes, *&c.* from the death of Sir *William*, according to the value at the time of eviction, which the maſter was to inquire into, with *Engliſh* intereſt on that ſum, as it is conſidered, as *ſterling* money from his death. 1 *Veſ.* 511. 1750. *Williamſon* v. *Codrington.*

5. A voluntary bond given by a perſon to a common woman, after he had kept her two years, not relieved againſt upon a bill by the executor of the obligor. *Ambl.* 641. 1767. *Hill* v. *Spencer.*

(H) Supported and made good, by Matter *ex poſt facto*, in what Caſes. 22 Vin. 23.

1. A Voluntary deed kept by a perſon, and never cancelled, will not be ſet aſide by a ſubſequent will. 1 *Atk.* 625. 1739. *Boughton* v. *Boughton.*

2. The aſſiſtance of the court cannot be had without conſideration to conſtitute a party *ceſtui que truſt*; as upon a voluntary covenant to transfer ſtock, *&c.*; but if the legal conveyance is actually made, conſtituting the relation of *truſtee & ceſtui que truſt*, as if the ſtock be actually transferred, *&c.* though without conſideration, the equitable intereſt will be enforced. 6 *Veſ. jun.* 656. 1802. *Elliſon* v. *Elliſon.*

22 Vin. 24. (I) Supplied. In what Caſes *Defect* therein ſhall be ſupplied.

1. A Man cannot come into equity to have a defect in a voluntary deed ſupplied. 1 *Veſ.* 515. 1750. *Williamſon* v. *Codrington.*

2. A court of equity will not carry into execution a voluntary deed without a valuable or a meritorious conſideration. 3 *Bro.* 12. 1789. *Coleman* v. *Sarrel & e contra.*

For more of *Voluntary Conveyance* in general, ſee *Creditors, Faits, Fraud, Grant, Uſes,* and other proper titles.

[G]

Voucher.

22 Vin. 167. (H. c) Proceſs and Pleading in Voucher, &c.

1. IF the vouchee does not appear in perſon but by attorney, there muſt be a ſummons *ad warrantizandum* for him as well as a warrant of attorney; by 24 *G.* 2. *c.* 48. *ſ.* 8. the writ of ſummons ſhall be made returnable the fourth day incluſive.

2. And the uſual courſe to *teſte* is the fourth day incluſive from the return of the writ of entry. 2 *Bl.* 1201.

3. The common vouchee cannot appear by attorney before the day of the return of the writ of ſummons. *Wynne* v. *Thomas, Willes's Rep.* 563. *Barnes,* 17. S. C. And if he die before the return the recovery is erroneous. *Ibid.*

4. But now the *teſte* of the write of ſummons *muſt* precede the actual acknowledgment of the warrant of attorney by the vouchee. 2 *Bl.* 1201.

5. And by rule of *C. B. Hil.* 14 *G.* 3. an affidavit muſt be made of the true time of the caption of the warrant. *Ibid.* 1202.

6. If the vouchee reſide in a foreign country, at ſuch a diſtance that the warrant of attorney cannot be returned before the return of the writ of ſummons, the tenant's appearance may be entered in the term on which the writ of ſummons is returnable, and then they may imparl from term to term, till the warrant of attorney arrive, when the recovery may be arraigned; and then if the vouchee were alive at the time of the arraignment, the recovery will be valid, otherwiſe not. 2 *Bl.* 1224.

7. If the writ of ſummons is returnable at a return within the term, the eſſoin day of which is a *Sunday,* and on that *Sunday* the vouchee dies, the recovery is bad; for the judgment cannot relate to any day prior to the return, and judgment cannot be given on a *Sun-*

a Sunday. *Swan* v. *Broome*, *Mich.* 5 *G.* 3. Affirmed (on the opinion of all the judges) in the Houſe of Lords 2d *May* 1766.

8. If the vouchee die ſix days before the return of the writ of ſummons, it is error, and the judgment cannot be made good by relation to the firſt day of the term; and though it appear on the face of the record that the voucher appeared by attorney at the return of the writ of ſummons, yet plaintiff is not eſtopped to aſſign it for error, for it is a collateral matter, and not contrary to the record. *Wynne* v. *Wynne*, *Wilſ.* 35. 42.

9. The death of the vouchee before judgment is error, and may be aſſigned as ſuch. *Sheepſhanks* v. *Lucas*, 1 *Burr.* 410.

10. In every common recovery where the vouchee ſhall perſonally appear, the writ of entry ſhall be ſued out and produced at the time of the recording of the vouchee's appearance at the foot of the præcipe in ſuch recovery. *Reg. Gen.* 30 *G.* 3. 1 *H. Bl.* 526-7.

Waſte.

(R. a) Equity. Injunction granted, in what Caſes. 22 Vin. 517.

1. IN caſes of waſte the court will not enjoin, unleſs the reverſioner or remainder-man be made a party. 3 *P. Wms.* 268. *Eaſt.* 1730. *Mollineux* v. *Powell in notis.*

2. Said, an injunction to ſtay waſte may be granted in favour of an infant *en ventre ſa mere*. 2 *Atk.* 117. 1740. *Wallis* v. *Hodſon and others*. *See alſo* 3 Atk. 211. Robinſon v. Litton, *where Lord Chancellor* Hardwicke *declared he ſhould not ſcruple to grant an injunction to ſtay waſte in favour of an infant* en ventre ſa mere, *though it had been hitherto ſaid* arguendo *only; and he inclined to think, that in an executory deviſe the heir at law ought to be reſtrained from committing waſte; and truſtees to preſerve contingent remainders, may have an injunction to ſtay waſte, before the contingent remainder-man comes into* eſſe. 3 Atk. 754. 1753. Garth v. Cotton, *and* 1 Dick. Rep. 183. S. C.

3. If a perſon has only threatened to open mines, a plaintiff may come into this court to reſtrain a defendant from doing it, for it is not neceſſary to ſtay till waſte is actually committed, where the intention appears, and the perſon inſiſts on his right to do it: and though no proof appear of waſte, yet if the tenant for life inſiſts on his right to do it and has none, the reverſioner may have an injunction. 2 *Atk.* 182. *May* 1741. *Gibſon* v. *Smith.*

4. Limitation to *A.* for life, to truſtees to preſerve contingent remainders, to the firſt and other ſons of *A.* in tail male, remainder to *B.* for life, remainder to his firſt and other ſons in tail male; reverſion in fee to *A.*, who cuts down timber, againſt whom *B.* brought his bill for an injunction to ſtay waſte: though *B.* has no right to the timber, yet as he has an intereſt in the maſt

maſt and ſhade, if *A.* ſhould die without ſons; and as *B.* could not maintain an action, not having the immediate remainder, the injunction was continued. 3 *Atk.* 94. *June* 1741. *Perrot* v. *Perrot.*

The truſtees, to ſupport contingent remainders, might have filed a bill for an injunction to ſtay waſte in the tenant for life. Per *Lord Chancellor.* Ibid. *And the cutting down decayed timber was ſaid to be as much waſte as any other.* Ibid.

5. *A.* deviſes lands to his ſon and his heirs, but in caſe he ſhould not attain 21, and die without iſſue, then he gives the lands to his daughters, and directs they ſhould be ſold, and the money divided amongſt the daughters. The ſon, who wants three quarters of a year of 21, intended cutting down 3000*l.* worth of timber: the daughters bring a bill to ſtay waſte. The court was of opinion that they were entitled to an injunction, as it is purſuing the teſtator's intention, and preſerving the value of the eſtates intended to go to the daughters. 3 *Atk.* 209. *Dec.* 1744. *Robinſon* v. *Letton.*

Where there is tenant for life, remainder for life, remainder in fee, or where there is tenant for life ſubject to waſte, remainder for life diſpuniſhable of waſte, remainder in fee: the court will not ſuffer an agreement between two tenants for life to commit waſte, to take place againſt the remainder-man. Per *Lord* Hardwicke. Ibid. *So alſo where a mortgagor commits waſte, he ſhall be reſtrained, becauſe the whole eſtate is the ſecurity.* Ibid.

6. Though a perſon be tenant for life, *without impeachment of waſte*, yet this court will grant an injunction to reſtrain him from cutting down trees in lines, or avenues, or ridings in a park, as they are for ornament. And whether the trees grow naturally, or were planted, yet if they ſerve for ornament or ſhelter, it is the ſame thing. 3 *Atk.* 215. *March* 1744. *Anon.*

7. In a bill to ſtay waſte, the plaintiff is not entitled to an injunction unleſs he waives the double penalty. 3 *Atk.* 453. 1746. *Boteler* v. *Allington.*

8. If a defendant by his anſwer admits that he had done waſte before the filing a bill, though he ſwears he has committed none ſince, yet that is not ſufficient to induce the court to diſſolve the injunction. 3 *Atk.* 489. 1747. *Anon.*

9. The court will not grant an injunction to ſtay waſte in digging mines till the anſwer is come in, or the defendant has made default in not putting in his anſwer. 3 *Atk.* 496. *May* 1747. *Sir James Lowther* v. *Stamper.*

10. Injunction granted at the ſuit of a ground landlord to ſtay waſte in an under-leſſee, who held by leaſe from the original leſſee; ſo a remainder-man in fee may have an injunction to ſtay waſte in the firſt tenant for life, notwithſtanding an intermediate eſtate for life. *Per* Lord *Hardwicke.* 3 *Atk.* 723. *Feb.* 1750. *Farrant* v. *Lovel.*

11. If a mortgagee in fee in poſſeſſion cuts down timber, and does not apply the money ariſing therefrom in ſinking the principal and intereſt of the mortgage, the mortgagor on bill filed may have an injunction to ſtay waſte: and if on the other hand, where there is only a mortgage for a term of years, and the mortgagor commits waſte, the court will grant an injunction. *Per* Lord *Hardwicke. Ibid.*

12. Sir *Thomas Aſton* in the ſame ſettlement, in which he makes himſelf tenant for life without impeachment of waſte, with full liberty to commit waſte, ſettles a jointure upon his wife for life, without impeachment of waſte: on ſettling another part, he creates a term on truſt to ſecure a rent-charge of 300*l. per annum* to his wife, as a further part of her jointure, and afterwards out of the rents and profits thereof to raiſe money from time to time, to reimburſe her expences in ſuſtaining and repairing her jointure eſtate. After his death ſhe lets her annuity, together with the intereſt of 3100*l.* given her by her huſband's will, run in arrear for three years. Upon her ſon's marriage ſhe gave up the ſaid arrears, and alſo 2000*l.* which he owed her, becauſe he could not otherwiſe make a jointure within the ſettlement. He went abroad, and there was an arrear of eight years during his life. Upon his dying without iſſue the eſtate came to his ſiſter *Catherine*, who brought this bill againſt her mother Lady *Aſton* to enjoin her from committing further ſpoil and deſtruction upon her jointure eſtate; and for ſatisfaction for the damage already done thereby, ſuggeſting that ſhe had cut down even ſuch timber as was not fit for repairs, ſuch as young ſaplins, *&c.*, not leaving a twig on the eſtate; and alſo to be quieted in the enjoyment of the lands free from the arrears incurred in her brother's life. The court therefore declared that the defendant ſhould have no benefit of the term till ſhe had reimburſed to the eſtate what ſhe had ſo unreaſonably cut away; and as to the future, the evidence being, that ſhe had left no timber even fit for farm houſes, ſhe was reſtrained from cutting any more timber off the eſtate without leave of the court. 1 *Veſ.* 204. 1749. *Aſton* v. *Aſton.*

13. The late Lord *Colerain* deviſed, that from his death till his daughter *Roſa Peregrina* attained 21, or married with conſent of her mother, the mother ſhould receive all the rents and profits from all his lands in *Middleſex* and *Norfolk*, with directions to pay 300*l. per ann.* to the daughter, and to take 900*l. per ann.* to herſelf, and to account with the daughter, if ſhe attained 21 or married: if the daughter died before either, then over. Information on behalf of the crown, upon ſuggeſtion of being an alien; and motion for an injunction to ſtay waſte; the court took time to conſider, but a demurrer was put in, which was overruled, and the judgment was affirmed on appeal to the Houſe of Lords. 2 *Veſ.* 286. 1751. *Attorney-General* v. *Dupleſſis.*

14. A guardian or truſtee for an infant having a contingent eſtate cannot cut timber on ſuggeſtion that it will not improve, though growing amongſt underwood. 2 *Veſ.* 362. 1751. *Knight* v. *Dupleſſis.*

15. Plaintiff being a termor of ground-rent, brought a bill againſt his leſſee to ſtay waſte; and moved at the Rolls for an injunction: and it was afterwards moved before the Lord Chancellor, and granted. *Ambl.* 105. 1756. *Farrant* v. *Lee.*

16. The patron of a living may have an injunction againſt the incumbent to ſtay waſte: and ſo may the Attorney-General

againſt a biſhop; but they cannot pray an account for their own benefit as patrons. *Ambl.* 176. 1753. *Knight* v. *Moſeley.*

17. Motion for an injunction to ſtay waſte, upon an affidavit generally, that the plaintiff was entitled to the fee ſimple of the eſtate, and that waſte was committed, refuſed; as a particular title muſt be ſet out: upon this being done, the motion was granted. 1 *Bro. Ch. Rep.* 57. 1779. *Whiteleg* v. *Whiteleg.*

18. *Thomas* Lord *Archer* deviſed lands in *Eſſex* to truſtees, to be ſold, and the money to be laid out in the purchaſe of lands in *Warwickſhire*, which when purchaſed were to be to the uſe of *Andrew* Lord *Archer* for life, without impeachment of waſte, remainder to Lady *Plymouth* and Lady *Winterton*, teſtator's daughters, and the heirs of their reſpective daughters, as tenants in common. The perſonal eſtate was limited to the ſame uſes as the real, and the rents and profits of the lands in *Eſſex*, till ſold, were to be to the uſe of the ſame perſons who would be entitled to the lands in *Warwickſhire*, when purchaſed. The eſtates in *Eſſex* not being ſold, Lord *Archer* cut down timber on that eſtate; and the queſtion was, whether he was entitled ſo to do, he being intended by the will to be tenant for life, in the lands to be purchaſed, without impeachment of waſte, and the rents and profits of the *Eſſex* eſtate being to go to the perſons entitled to the eſtate to be purchaſed. His Honor Sir *Thomas Sewell* decreed that *Andrew* Lord *Archer* was not entitled to cut timber on the *Eſſex* eſtates, and ordered the defendant his executrix to account for the timber ſo cut. And on appeal the decree was affirmed. 1 *Bro. Ch. Rep.* 159. 1782. *Counteſs Dowager of Plymouth and others* v. *Lady Dowager Archer.*

19. *Thomas Dummer* by a codicil to his will provided, that his wife, whom he made tenant for life, might cut timber "for her own uſe and benefit at ſeaſonable times," ſhe was reſtrained from cutting trees which were ſaplings and not proper to be cut as timber. 1 *Bro.* 166. *Chamberlyne* v. *Dummer.*

On this cauſe afterwards coming on to be heard, a trial at law was directed to aſcertain whether the defendant had cut down any, and what trees planted for ornament or ſhelter. 3 Bro. Cha. Rep. 549. —— *Bill by the eldeſt ſon, tenant in tail, expectant on the death of the father tenant for life, to reſtrain him from committing waſte, by cutting down timber, eſpecially ſuch as was ornamental to the houſe. The court, upon affidavit, and certificate of the bill filed, granted an injunction to reſtrain the defendant from committing waſte upon ſuch part of the eſtate whereof he was ſubject to impeachment of waſte; and as to the manſion-houſe, out-houſes, gardens, and orchards, timber growing for ornament and ſhelter to the houſe, to reſtrain him from committing waſte therein till anſwer or further order.* 1 Bro. Ch. Ca. 167. Leighton v. Leighton, in notis. —— *Injunction to reſtrain defendants from cutting down any timber trees or other trees growing on the eſtate, which were planted or growing there for ornament or ſhelter of the manſion-houſe, or that grew in viſtas, planted walks, or lines for the ornament of the park part of the eſtate, and alſo from cutting down any ſuplings growing on any part of the eſtate not proper to be felled, till anſwer or further order.* 1 Bro. Cha. Rep. 167. 1751. Obrien v. Obrien, in notis.

20. Injunction to ſtay waſte was granted to prevent the tenant for life without impeachment of waſte, from improper waſte; but the anſwer denying any intention of cutting young or ornamental trees, the order was diſſolved, though the original affidavit was read againſt the anſwer. 2 *Bro. Cha. Rep.* 88. 1786. *Strathmore* v. *Bowes.*

21. Bill

21. Bill by the patroneſs, the ordinary, biſhop of the dioceſe, and churchwardens of the living of *Oxted*, againſt the widow of the late incumbent, to reſtrain her from committing waſte, and an injunction was granted. 2 *Bro. Cha. Rep.* 552. 1789. *Hoſkins* v. *Featherſtone.*

A motion was made on behalf of the plaintiff, who was patron of the living, againſt the rector, for an injunction to ſtay waſte in cutting down timber in the church-yard; which was granted, except ſuch timber be for the repairs of the parſonage-houſe, or chancel, or old pews belonging to the rectory. 2 Atk. 217. 1741. Strachy v. Francis.

22. An order was made to prevent the removal of timber wrongfully cut. 1 *Veſ. jun.* 93. 1791. *Anon.*

23. The general controuling power of the court over charities does not extend to a charity regulated by governors under a charter, unleſs they have alſo the management of the revenues, and abuſe their truſt, which will not be preſumed, but muſt be apparent and made out by evidence. The Foundling Hoſpital is an inſtitution of this kind; therefore, on motion, an injunction to reſtrain the governors from building round it was refuſed, and held not to be in the nature of waſte to turn meadow into buildings, unleſs *clearly* injurious. 2 *Veſ. jun.* 42. 1793. *Attorney-General* v. *The Governors of the Foundling Hoſpital*, 4 *Bro. Cha. Rep.* 165. S. C.

24. Mortgagee of a copyhold may pull down ruinous houſes, and build better houſes to prevent a forfeiture. *Per* Maſter of the Rolls. 3 *Veſ. jun.* 480. 1799. *Hardy* v. *Reeves.*

25. Injunction to reſtrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct; amounting to a conſent to the plaintiff's plan of improvement, laying out the lawn, *&c.* 5 *Veſ. jun.* 688. 1800. *Jackſon* v. *Cator.* And ſending a ſurveyor to mark out trees was held a ſufficient ground for an injunction. *Ibid.*

26. Injunction reſtraining tenant for life, without impeachment of waſte, from cutting down timber growing for ornament or ſhelter, extended to clumps of firs on a common two miles from the houſe, the clumps having been planted for ornament. 6 *Veſ. jun.* 107. 1801. *Marquis of Downſhire* v. *Lady Sandys.*

27. Injunction was granted againſt ploughing up ancient paſture, upon a covenant to manage in a huſbandlike manner. 6 *Veſ. jun.* 328. 1801. *Drurey* v. *Molins.*

28. Injunction was granted to reſtrain tenant for life, without impeachment of waſte, from cutting timber or other trees planted or growing for ſhelter or ornament, and from cutting, except in a huſbandlike manner. 6 *Veſ. jun.* 419. 1801. *Lord Tamworth* v. *Lord Ferrers.*

29. Injunction againſt waſte in favour of tenant for life, particularly as to ornamental timber; not ſo much upon his intereſt as his enjoyment. 6 *Veſ. jun.* 787. 1802. *Davies* v. *Lee.* But an injunction will not be granted without poſitive evidence of title. *Ibid.*

See *Injunction* and other proper titles.

22 Vin. 522.

(S. a) Relief in Equity.

1. *A.* Tenant for life, remainder to *B.* in tail as to one moiety, remainder as to the other moiety to *C.* an infant in tail, remainder over. There was timber upon the premiſes greatly decayed: *B.* the remainder-man brings a bill, praying, that the decaying timber may be cut down, ſold, and the money divided betwixt him and the infant; and the tenant for life inſiſts to have part of the money. Tenant for life muſt have ſufficient left for repairs, *&c.* and an allowance for all damage done to the ground; but he is to have no allowance for the timber, which, when ſevered by accident, or by a treſpaſſer, belongs to the firſt owner of the inheritance. Decaying timber, if for ornament or ſhelter, not to be cut down; and where an infant is intereſted in the inheritance, no timber can be cut down, but by the approbation of the maſter, and the infant's ſhare of the money muſt be laid out for his benefit. 3 *P. Wms.* 267. *Eaſt.* 1734. *Bewick* v. *Whitfield.*

The Duke of Bolton was tenant for life, with contingent remainders to his firſt and other ſons, remainder to Mrs. Orde *for life, remainder to her firſt and other ſons, (with other contingent remainders over) remainder to the duke in fee. Mrs.* Orde *had a ſon, who died a few days after his birth. All the contingent remainders being yet in expectancy, the duke cut down timber. Mrs.* Orde *had afterwards another ſon, who was a defendant in the cauſe on the queſtion to whom this timber ſhould belong. The Lord Chancellor was of opinion, that as it was not competent for the duke to cut down timber in reſpect of his life eſtate, he ſhould not take advantage of his own wrong; that the timber, although by ſeverance become perſonalty, was yet bound, as far as it could be, to the uſes of the realty. That the adminiſtrator of Mrs.* Orde's *firſt ſon was certainly not intitled, the child being dead at the time of the timber cut; neither could her ſecond ſon claim it, for although he had a veſted eſtate of inheritance, yet ſuch eſtate was liable to be diveſted by the duke's having a ſon. His Lordſhip therefore thought nobody at preſent intitled, but directed the duke to pay into court to the credit of the cauſe the ſum of* 2943*l.* 10*s.* 10*d.* *for which the timber has been ſold, and ordered that the Maſter ſhould inquire into and aſcertain the times at which the ſaid ſum or any part thereof was received by the defendant the duke, and ſhould compute intereſt from ſuch times reſpectively, and that the duke ſhould pay into court in like manner what ſhould be found to be the amount of ſuch intereſt, and that ſuch principal and intereſt ſhould be laid out ſubject to further order, with liberty for any perſon intereſted to apply.* Williams v. Duke of Bolton. Feb. 1784. 3 P. Wms. 268. in notis.

2. A tenant for life, though without impeachment of waſte, ſhall be obliged to keep the tenants' houſes in repair, unleſs the charge be exceſſive, and ſhall not ſuffer them to run to ruin. 2 *Atk.* 383. *Aug.* 1742. *Parteriche* v. *Powlet.*

3. Bill for a ſatisfaction for waſte in cutting down timber trees, againſt an aſſignee of the leſſee of a college, after the aſſignment, and for waſte done before the aſſignment after the eſtate of the tenant, who cut down the timber, is determined by aſſignment, the bill did not pray an injunction. And the court was of opinion that a bill would not lie for a ſatisfaction for waſte without praying an injunction; and diſmiſſed the bill with coſts. 3 *Atk.* 262. *Mich.* 1745. *Jeſus College* v. *Bloome.*

4. There are many inſtances where in the caſe of mines, which is a ſort of trade, the court has decreed an account, which it would not have done in the caſe of timber. *Ibid.*

5. There is no privilege of peerage in *Ireland* in caſe of *waſte*; *quere* as to *England.* 3 *Atk.* 481. 1747. *Ex parte Anneſley.*

6. *G.* te-

6. *G.* tenant for 99 years, if he ſo long live, without impeachment of waſte, except voluntary, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail male, remainder to Sir *John Cotton* in fee. *G.* before a ſon born and Sir *John Cotton* agreed to cut down timber upon the eſtate, and that Sir *John Cotton* ſhould not take advantage of its being waſte, and the money ariſing from it was to be divided between them. The timber cut was of the value of 2000*l.*, as appeared by Sir *John Cotton*'s anſwer. *G.*'s ſon the plaintiff was born 10 years afterwards, attained his age of 21, and ſuffered a recovery of the eſtate to himſelf and his heirs; and he was held entitled to recover ſatisfaction for ſo much of the value of his inheritance as the late Sir *John Cotton* received under this agreement, and his executors admitting aſſets, 1000*l.* with intereſt at 4 *per cent.* was directed to be computed from the filing of the bill, and paid to the plaintiff by the executors of Sir *John Cotton*. 3 *Atk.* 751. 1753. *Garth* v. *Cotton.* 1 *Veſ.* 524. 546. S. C. 1 *Dickins' Rep.* 183. S. C.

7. The money raiſed by ſale of timber improperly cut by tenants for life, impeachable, *&c.*: ordered to be paid to the next taker of the inheritance, though there were intermediate remainders that might ariſe. Such tenant cutting timber will be liable to account, but where no more timber has been cut than is charged in the bill and admitted in the anſwer, the money ſhall be paid without coſts. 3 *Bro. Ch. Rep* 37. 1789. *Lee* v. *Alſton.* See alſo 1 *Bro. Ch. Rep.* 195. S. C. 1 *Veſ. jun.* 78. Admiſſion that any timber has been cut gives a right to account. *Ibid.* 82.

8. Tenant for life without impeachment of waſte cannot maintain *trover* for timber ſevered during a prior eſtate: but it veſts immediately in the owner of the inheritance. 1 *Veſ. jun.* 479. 1792. *Pigot* v. *Bullock.*

9. *A.* tenant for life, remainder to his ſons ſucceſſively in tail male, remainder to *B.* for life, and to her ſons in the ſame manner, with truſtees to preſerve contingent remainders. *A.* being alſo ſeiſed of the reverſion in fee, cut and ſold timber before the birth of a tenant in tail: afterwards *B.* had a ſon, who died ſoon after his birth, and another ſon, who ſurvived *A.* The produce of the timber was decreed to be laid out in the funds during the life of *A.*, and upon his death without having had a ſon was decreed to be laid out in land, to be ſettled to the uſes of the eſtate upon which the timber was cut. 3 *Veſ. jun.* 374. 1797. *Powlett* v. *The Ducheſs of Bolton.*

10. The lord of a manor is confined to his legal remedy for waſte committed by a copyholder; and has no equity for an injunction and account. 4 *Veſ. jun.* 700. 1799. *Dench* v. *Bampton.* And it was ſaid *per* Lord Chancellor, that there could be no action of waſte between the lord and his tenant, but he doubted whether upon waſte by a copyholder by cutting timber the lord could bring trover, particularly when by the cuſtom the right to

the timber when cut is in both. The caſe of lord and tenant not being like that of tenant for life and remainder man, their rights are upon the ſame ground, and the reverſioner enters for the forfeiture; but the lord muſt have it preſented by the homage. *Ibid.*

[G]

Waver.

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22 Vin. 531. (D) Of Pleadings. In what Caſes a Man may waive the Plea or Iſſue, and plead another or the general Iſſue after Plea pleaded.

1. THE defendant cannot commonly waive the general iſſue, and inſtead thereof give a ſpecial plea. (1 *Wilſ.* 29. *in marg.*) But it is ſaid, that if the general iſſue be not entered, the defendant may waive it, and plead ſpecially without leave of the court in four days. (1 *Ld. Raym.* 674.): or, as it ſhould ſeem, before the adjournment day of the term. (*Sayer's Rep.* 87.) Or within the firſt five days of the enſuing term. *Prax. utr. Banci*, 37. *R. T.* 5 & 6 *Geo.* 2. (*b*).

2. And even afterwards, by leave of the court, where it is not to the prejudice or delay of the plaintiff. *Jefferies* v. *Walter*, 1 *Wilſ.* 177. In this caſe leave was given to withdraw *non eſt factum* to a bond, and to plead the ſtatute of gaming.

3. The defendant permitted, upon terms of taking ſhort notice of trial, to plead a ſpecial juſtification, after he had pleaded the general iſſue. *Taylor* v. *Joddrell*, 1 *Wilſ.* 214.

4. In debt for the penalty of articles relating to the building of *Putney* bridge. The defendant pleaded *nil debet*. The plaintiff demurred, and the defendant joined in demurrer. Afterwards he moved that he might be at liberty to withdraw his plea of *nil debet*, and plead double, *viz.* that he was not appointed by the commiſſioners, and that he did not agree with them to build the bridge. And it appearing the plaintiff had not been delayed, the court gave leave accordingly. *Meard* v. *Phillips*, 2 *Stra.* 906. *Vide* alſo *Wilkes* v. *Wood*, 2 *Wilſ.* 204. S. P. after iſſue joined and notice of trial given. *Vide* alſo *Blackbourne* v. *Matthias*, 2 *Stra.* 1267.

5. But in the caſe of *Law* v. *Law*, in debt upon bond conditioned for payment of money at a future day, the defendant pleaded payment at the day; and before the plaintiff replied, moved to withdraw his plea and plead the ſtatute of 5 *Ed.* 6. *c.* 16. againſt the ſale of offices. *Sed per curiam.* That is never done but in order to plead the general iſſue, not to ſubſtitute one

ſpecial

ſpecial plea in the room of another. So the motion was denied. 2 *Stra.* 960.

6. And in *Hare* v. *Lloyd*, 1 *Term Rep.* 693. it was determined on the authority of *Prout* v. *Dewar*, (*ib. notis*) that after a rule to abide by a ſpecial plea, or plead ſuch other plea as the defendant will abide by, he can only plead the general iſſue.

7. The defendant pleaded the general iſſue, but forgot to give notice at the ſame time of ſet-off. And upon motion in time, the court gave leave to withdraw the plea in order to deliver the ſame plea again with a proper notice of ſet-off, and ſaid it had been done before. *Blackourne* v. *Matthias*, 2 *Stra.* 1267. See alſo *Tarlton* v. *Wragg*, *Ibid.* 1271. as to bringing money into court on the ſame reaſon.

8. The defendant having pleaded the general iſſue, moved for leave to withdraw that plea and to plead the ſame plea again, together with the plea of the ſtatute of limitations. But *per curiam*. The court gives leave to add a plea for the furtherance of juſtice, which goes to try the real merits of the cauſe, but the plea of the ſtatute of limitations is not to be favoured, becauſe it excludes the merits. The rule was diſcharged *per totam curiam*. *Cox* v. *Rolt*, *C. B.* 2 *Wilſ.* 253.

9. Though it be a general rule that the defendant cannot waive a ſpecial plea except to plead the general iſſue, yet leave has been given under circumſtances for the defendant to *add* a plea after iſſue joined, and even after two terms have elapſed ſince he firſt pleaded. *Vide Waters* v. *Bovill*, 1 *Wilſ.* 223.

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THE END.

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